

***United States Court of Appeals
for the Second Circuit***



JOINT APPENDIX

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OF SERVICE

77-7067

United States Court of Appeals

FOR THE SECOND CIRCUIT

NOVELTY TEXTILE MILLS INC.,

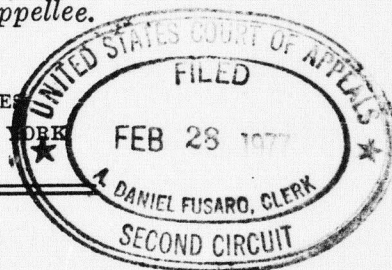
Plaintiff-Appellant,

—v.—

JOAN FABRICS CORPORATION,

Defendant-Appellee.

ON APPEAL FROM AN ORDER OF THE UNITED STATES
DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK



JOINT APPENDIX

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DOCKET ENTRIES

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PLAINTIFFS

NOVELTY TEXTILE MILLS, INC.

DEFENDANTS Werker, J.

JOAN FABRICS CORPORATION

2/15

LS

CAUSE

Copyright infringement.

ATTORNEYS

Blum Moscovitz Friedman & Kaplan
730 3rd Ave., NYC 10017
867-2200

Kaye Scholer Fierman Hays & Handler
425 Park Ave., NYC 10022 PL 9-8400

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FORMA

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Novelty Textile Mills Inc. vs. Joan Fabrics Corp

DATE

NR.

PROCEEDINGS

DATE	NR.	PROCEEDINGS
12-22-76	1	Filed complaint - issued summons
12-22-76	2	Filed affdvt. and order appointing person to serve process.
12-30-76	3	Filed plaintiff's memorandum of law in support of its motion for prel. injunction.
12-30-76	4	Filed pltf's affdvt. and notice of motion for prel. injunction - ret. 01-20-77
12-30-76	5	Filed summons and affdvt. of service -- served: joan Fabrics Corp. (S&C and mot. for prel.inj.) on 12-22-76
01-18-77	6	Filed defendant's brief in opposition to pltf's motion for preliminary injunction
01-21-77	--	Hearing begun and concluded on motion for prel. injunction. Decision reserved -- Werker, J. briefs and memo to be submitted.
01-18-77	7	Filed ANSWER KSFH&H
01-27-77	8	Filed defts affdvt. of John A. Beatty re #4
01-27-77	9	Filed defts affdvt. of Robert J. Gangi re #4
01-27-77	10	Filed defts affdvt. of Arthur Zellers re #4
01-27-77	11	Filed defts affdvt. of Lawrence Ansin re #4
01-27-77	12	Filed defts affdvt. of William A. Ross re #4
02-02-77	13	Filed MEMORANDUM-DECISION...Pltf's motion for prel. inj. is denied. -- Werker, J. m/n
02-10-77	14	Filed pltf's notice of appeal to the USCA, 2nd Circuit from order #13. m/copies.
2-10-77		Filed pltf's. reply memorandum of law in support of motion for prelim. injunction.
3-14-77		FILED TRANSCRIPT RECORD OF PROCEEDINGS DTD 1/26/77

A TRUE COPY
 RAYMOND F. BURGEAT, Clerk
 By [Signature] Deputy Clerk

A-3
COMPLAINT

Docket No.

L-76722

JKS/kw

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

G

DEC 22 4 10 PM '75

①

-----X
NOVELTY TEXTILE MILLS INC., :
Plaintiff, : Civil Action No.
v. :
JOAN FABRICS CORPORATION :
Defendant. :
-----X

COMPLAINT

Plaintiff alleges:

1. Plaintiff, Novelty Textile Mills Inc. (hereinafter NOVELTY) is a corporation of the State of Connecticut having its headquarters at Wauregan, Connecticut and having an office and place of business at 350 Fifth Avenue, New York, New York 10001.

2. On information and belief, Defendant Joan Fabrics Corporation (hereinafter JOAN) is a corporation of the State of Delaware having a place of business at 350 Fifth Avenue, New York, New York 10001.

3. This claim arises under the copyright laws of the United States and more particularly 17 U.S.C. Sections 101, 112 and 116 and is brought to redress the infringement of a copyrighted work of art. Jurisdiction is conferred on this Court by 28 U.S.C. 1338(a), with venue being proper under 28 U.S.C. 1400(a).

4. Prior to January 5, 1976, plaintiff, which was then and ever since has been a citizen of the United States, acquired all rights in a work of art in the form of a textile design entitled or denominated "Style No. 253". Said textile design constitutes copyrightable subject matter under the copyright laws of the United States.

5. Plaintiff complied in all respects with the copyright laws of the United States, 28 U.S.C. Sections 1-32 and secured the exclusive copyright in and to said work of art, and received from the Register of Copyrights a Certificate of Registration of said copyright dated and identified as follows: January 5, 1976 Registration No. Gp 112119. The Certificate of Registration was mailed from the Copyright Office on or about December 20, 1976. A photocopy of the application is annexed hereto as Complaint Exhibit 1. A photocopy of the actual Certificate of Registration will be supplied as soon as it is received.

6. Since January 5, 1976, publication of said work of art and all copies thereof made by plaintiff or under plaintiff's authority or license, have been published in strict conformity with the copyright laws of the United States; and plaintiff has been and still is the sole proprietor of all rights, title and interest in and to said copyright and said copyright is valid and subsisting and in full force and effect. A color photograph of a section of plaintiff's copyrighted Style No. 253 textile design is appended hereto as Complaint Exhibit 2.

7. Plaintiff's Style No. 253 textile design has been widely accepted as an upholstery fabric by the manufacturers of upholstered furniture. Plaintiff's Style No. 253 has had considerable success since it was first introduced during the

first week in January 1976.

8. Sometime during 1976, on a date not presently known to plaintiff, defendant, knowing full well the excellent and enviable reputation and goodwill of plaintiff in said Style No. 253 upholstery fabric textile design, did infringe upon plaintiff's Style No. 253 by copying and imitating, or arranging for the copying and imitation thereof.

9. Defendant, with full knowledge of the rights of plaintiff, infringed said copyright by manufacturing, producing, knitting, publishing, vending, distributing, selling, promoting or advertising upholstery fabrics bearing designs designated as defendant's Style No. CK0028 and defendant's Style "Fleetwood", both of which are copies of plaintiff's copyrighted design, all in violation of the rights of plaintiff under Section 1(a) of the copyright laws of the United States, 17 U.S.C. A color photograph of defendant's Style No. CK0028 is annexed hereto as Complaint Exhibit 3 and a color photograph of defendant's Style "Fleetwood" is annexed hereto as Complaint Exhibit 4.

10. Defendant had ample notice of plaintiff's copyright when defendant set out to copy plaintiff's copyrighted Style No. 253. Full and prominent statutory copyright notices have at all times appeared on plaintiff's products and on plaintiff's samples; and defendant's infringement of plaintiff's copyright was and is willful, wanton and in utter disregard of plaintiff's rights.

11. Defendant authorized, consented to or knowingly participated in the manufacture, production, publication, distribution, sale and promotion of its infringing upholstery fabrics, in willful disregard of plaintiff's rights in its copyright.

12. Defendant was specifically notified of its copyright infringement by letter dated November 5, 1976, the receipt of which letter was acknowledged by defendant's attorneys on November 9, 1976.

13. Plaintiff has no adequate remedy at law.

14. Defendant's infringement of plaintiff's copyright has been to the unlawful profit of defendant and to plaintiff's monetary damage in an amount thus far not determined.

WHEREFORE, plaintiff prays for a judgment and decree of this Court providing as follows:

(a) That defendant, its officers, agents, employees, distributors and suppliers, and others acting in concert or participating with defendant, be enjoined during the pendency of this action and permanently thereafter from infringing on plaintiff's copyright in its Style No. 253 textile design copyrighted January 5, 1976, Registration No. Gp 112119 and from making, manufacturing, producing, publishing, advertising, distributing, selling or offering for sale or otherwise disposing of upholstery fabrics or other goods having designs similar to the aforesaid copyrighted Style No. 253 textile design including defendant's Style No. CK0028 and Style Fleetwood.

(b) That defendant be required to pay to plaintiff such damages as plaintiff has sustained and to account for such gains, profits and advantages as the defendant has derived by reason of its acts of infringement herein, and to the extent that it appears to the Court to be just and proper, but no less than \$1.00 for each yard of infringing fabric made or sold by or caused to be made or sold by, or found in the possession of, the defendant or its agents or employees.

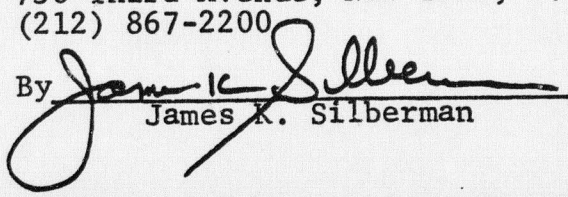
(c) That defendant be required to deliver up for impoundment during the pendency of this action and for destruction thereafter, all copies infringing on plaintiff's aforesaid copyright including without limitation all goods of defendant in defendant's Style No. CK0028 and Style Fleetwood, and all drawings, programs, cards, tapes and any and all other devices for making infringing designs or knitting or weaving infringing fabrics, or other materials with such designs; and all brochures, advertisements and written descriptions of said copies and designs.

(d) That defendant pay to plaintiff the costs and disbursements of this action and reasonable attorneys' fees.

(e) That plaintiff have such other and further relief as to the Court seems just and proper.

BLUM, MOSCOVITZ, FRIEDMAN & KAPLAN
Attorneys for Plaintiff
730 Third Avenue, New York, N.Y. 10017
(212) 867-2200

By


James K. Silberman

OF COUNSEL:

James K. Silberman, Esq.
Harold I. Kaplan, Esq.

EXHIBIT 1 TO COMPLAINT - APPLICATION FOR
REGISTRATION OF CLAIM TO COPYRIGHT

Page 1

FORM G

Application for Registration of a Claim to Copyright
in a work of art or a model or design for a work of art

CLASS	REGISTRATION NO.
G	
DO NOT WRITE HERE	
GF	GFC GP GU

Instructions: Make sure that all applicable spaces have been completed before you submit the form. The application must be **SIGNED** at line 11. For published works the application should not be submitted until after the date of publication given in line 6(a), and should state the facts which existed on that date. For further information, see page 4.

Pages 1 and 2 should be typewritten or printed with pen and ink. Pages 3 and 4 should contain exactly the same information as pages 1 and 2, but may be carbon copies.

Mail all pages of the application to the Register of Copyrights, Library of Congress, Washington, D.C., 20540, together with:

(a) If unpublished, a photograph or other identifying reproduction of the work and the registration fee of \$6.

(b) If published, two copies of the best edition of the work (or if appropriate, photographs—see line 4) and the registration fee of \$6.

Make your remittance payable to the Register of Copyrights.

1. Copyright Claimant(s) and Address(es): Give the name(s) and address(es) of the copyright owner(s). For published works the name(s) should ordinarily be the same as in the notice of copyright on the copies deposited. If initials are used in the notice, the name should be the same as appears elsewhere on the copies.

Name Novelty Textile Mills Inc.

Address Wauregan, Connecticut 06387

Name _____

Address _____

2. Title: Style No. 253
(Give the title of the work as it appears on the copies; a descriptive title may be used where the work is entirely pictorial or sculptural)

3. Nature of Work: Textile Design
(Characterize the general type of artistic work involved, as, for example, painting, drawing, sculpture, design, model, etc.)

NOTE: Leave line 4 blank unless the work has been PUBLISHED and photographs deposited in lieu of copies.

4. Optional Deposit: (See information on page 4.)
Basis for claiming option (Check and fill in ONE of the following):

☐ Monetary value (retail value per copy) ☐ Weight (in pounds)
☐ Size (give dimensions) ☐ Fragility (give details)

5. Author (i.e., Artist): Citizenship and domicile information must be given. Where a work is made for hire, the employer is the author. The citizenship of organizations formed under U.S. Federal or State law should be stated as U.S.A. If the copyright claim is based on new matter (see line 7) give information about the author of new matter.

Name Novelty Textile Mills Inc. Citizenship U.S.A.
(Give legal name followed by pseudonym if latter appears on the copies) (Name of country)

Domiciled in U.S.A. Yes ☒ No _____ Address Wauregan, Connecticut 06387

NOTE: Leave all spaces of line 6 blank unless your work has been PUBLISHED.

6. (a) Date of Publication: Give the complete date when copies of this particular work were first placed on sale, sold, or publicly distributed. The date when copies were made or printed should not be confused with the date of publication. (NOTE: The full date (month, day, and year) must be given.)

January 5, 1976
(Month) (Day) (Year)

(b) Place of Publication: Give the name of the country in which this particular work was first published.

(c) Manufacture Outside United States by Lithographic or Photoengraving Process: If the copies of this work were manufactured outside the United States by lithographic or photoengraving process, give the name of the country of manufacture.

United States

NOTE: Leave all spaces of line 7 blank unless the instructions below apply to your work.

7. Previous Registration or Publication: If a claim to copyright in any substantial part of this work was previously registered in the U.S. Copyright Office in unpublished form, or if a substantial part of the work was previously published anywhere, give requested information.

Was work previously registered? Yes _____ No _____ Date of registration _____ Registration number _____

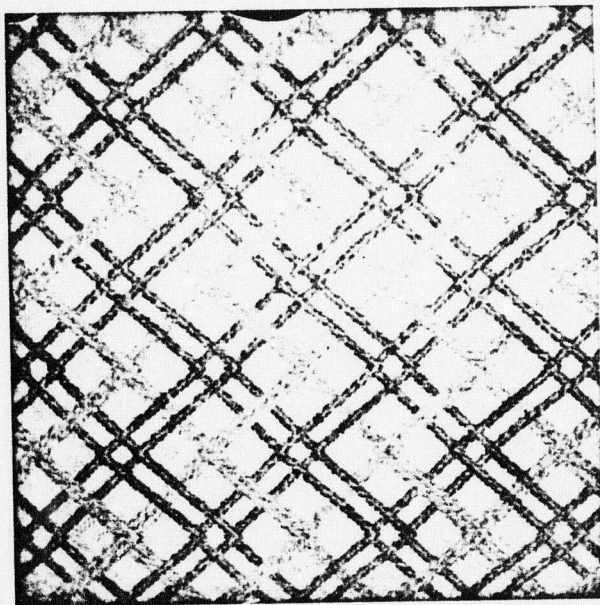
Was work previously published? Yes _____ No _____ Date of publication _____ Registration number _____

Is there any substantial NEW MATTER in this version? Yes _____ No _____ If your answer is "Yes," give a brief general statement of the nature of the NEW MATTER in this version. (New matter may consist of compilation, abridgment, editorial revision, and the like, as well as additional artistic or graphic material.)

EXAMINER

Complete all applicable spaces on next page

EXHIBITS 2, 3 and 4 TO COMPLAINT - PHOTOGRAPHS
OF FABRICS



NOVELTY
STYLE #253
CANE

EXHIBIT 2



JOAN
CK0028
SLATE

EXHIBIT 3



JOAN
FLEETWOOD
SPICE

EXHIBIT 4

ANSWER

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X

NOVELTY TEXTILE MILLS INC. :

Plaintiff, :

v. :

Civil Action No.

76 Civ. 5753 (HFW)

JOAN FABRICS CORPORATION :

Defendant. :

-----X

ANSWER

Defendant, Joan Fabrics Corporation, hereby
answers the Complaint herein, as follows:

1. The allegations of Paragraph No. 1 are
admitted.

2. The allegations of Paragraph No. 2 are
admitted.

3. Defendant admits that plaintiff asserts
a claim which arises under the Copyright Laws, if at
all, and that plaintiff alleges the existence of a
copyrighted work of art and the infringement thereof.
Defendant admits that jurisdiction and venue are
proper. Otherwise, the allegations of Paragraph No.
3 are denied.

4. Defendant admits that plaintiff is a
citizen of the United States, and that under proper
circumstances textile fabric designs may constitute
copyrightable subject matter under the Copyright Laws
of the United States. Defendant is without knowledge
sufficient to form a belief as to the truth or falsity
of the allegations as to acquisition and ownership
contained in Paragraph No. 4, and therefore leaves

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SOUTHERN DISTRICT OF NEW YORK

plaintiff to its proof. Otherwise, the allegations of Paragraph No. 4 are denied. Defendant specifically denies that plaintiff's Style No. 253 is properly copyrightable.

5. Defendant admits that a Certificate of Registration was issued by the Registrar of Copyrights to plaintiff, and that such Certificate bears the Number GP 112119, and that such issuance apparently took place on or about December 20, 1976. Otherwise, the allegations of Paragraph No. 5 are denied. Defendant specifically denies that rights of any kind or nature or extent have been "secured" to plaintiff.

6. Defendant admits that Exhibit 2 attached to the Complaint is a color photograph, and appears to be a photograph of plaintiff's Style No. 253 - Cane, insofar as can be ascertained having in mind the quality of the photograph. Further, defendant is without knowledge sufficient to form a belief as to the ownership of the copyright in question, and therefore leaves plaintiff to its proof. Otherwise, the allegations of Paragraph No. 6 are denied. Defendant specifically denies that the requirements of copyright notice have been complied with by plaintiff.

7. Defendant is without knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in Paragraph No. 7, and therefore leaves plaintiff to its proof.

8. The allegations of Paragraph No. 8 are denied. Defendant specifically denies copying, and specifically denies infringement.

9. Defendant admits that it has offered for sale and sold textile fabrics under the designations CK 0028 and Fleetwood, and that Exhibits 3 and 4 attached to the Complaint are color photographs of what appear to be, respectively, defendant's fabrics CK 0028 - Slate, and Fleetwood - Spice. Otherwise, the allegations of Paragraph No. 9 are denied. Defendant asserts that it has sold or offered for sale the following styles all of which are based upon the same well-known theme: CK 0028; CK 0035; CK 0042; Fleetwood; and Electra; each in a variety of color renditions. Defendant denies that plaintiff's copyright has any scope, or any scope broad enough to cover any of defendant's fabrics; and denies that any of said fabrics infringe such copyright.

10. Defendant admits its personnel did see plaintiff's Style No. 253 in April, 1976, but otherwise denies the allegations of Paragraph No. 10, and specifically denies infringement, willfulness, and proper marking.

11. Defendant admits that it intended to sell what it has sold, but otherwise denies the allegations of Paragraph No. 11.

12. Defendant admits receiving from plaintiff's attorney a letter dated November 5, 1976, which letter alleged the existence of a copyright in plaintiff's fabric and asserted the infringement thereof by defendant. Defendant further admits that receipt of said letter was acknowledged by defendant's attorney under date of November 9, 1976. Otherwise, the allegations

of Paragraph No. 12 are denied.

13. The allegations of Paragraph No. 13 are denied.

14. The allegations of Paragraph No. 14 are denied.

WHEREFORE, Defendant prays that this Court enter a Final Judgment and Decree providing as follows:

(a) That plaintiff is not entitled to any of the relief sought by it in its Complaint in this matter, and that plaintiff is not entitled to any relief of any kind against defendant herein; and

(b) That the Complaint herein is dismissed for lack of merit and/or want of equity; and

(c) That plaintiff's copyright as represented by Registration No. GP 112119 is not infringed by defendant's fabric styles CK 0028; CK 0035; CK 0042; Fleetwood and Electra, or any of them; and

(d) That plaintiff's copyright in its Style No. 253 is invalid and/or unenforceable; and

(e) That defendant is free to manufacture and sell any or all of the aforesaid fabrics without harrassment directed by plaintiff to either defendant or any of its customers; and

(f) That defendant shall have from plaintiff its reasonable costs and fees in this matter; and

(g) That defendant have such other and further relief as to the Court seems just and proper.

KAYE, SCHOLER, FIERMAN, HAYS
& HANDLER

By Randolph M. Merman
(A Member of the Firm)

Attorneys for Defendant
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New York, New York 10022
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Joell T. Turner
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P.O. Drawer 10337
Charlotte, North Carolina 28237
Tel: (704) 377-1561

NOTICE OF MOTION AND MOTION FOR PRELIMINARY
INJUNCTION

Docket No.

L-76722

JKS/kw

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

(4)

-----X

NOVELTY TEXTILE MILLS INC. :

Plaintiff, :

v. :

JOAN FABRICS CORPORATION, :

Defendant. :

-----X

Civil Action No.

76 Civ. 5753 (HFW)

RECEIVED IN CHAMBERS
OF JUDGE HENRY F. WERKER

JAN 15 1977

[Handwritten signature]

NOTICE OF MOTION AND MOTION FOR
PRELIMINARY INJUNCTION

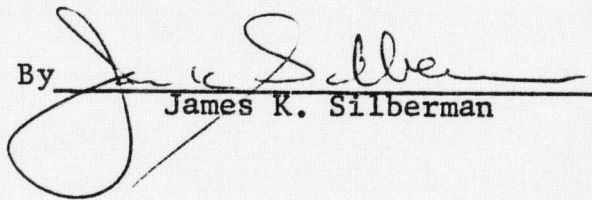
TO: JOAN FABRICS CORPORATION
350 Fifth Avenue
New York, New York 10001

PLEASE TAKE NOTICE that on the 20th day of January, 1977, at 4:30 P.M. in a motion part of this Court to be held in Courtroom 312 of the United States Court House, Foley Square, New York, New York, plaintiff will move, pursuant to Rule 65 of the Federal Rules of Civil Procedure, for a preliminary injunction enjoining and restraining defendant, its officers, agents, employees, distributors and suppliers and others acting in concert or participating with any of them pending the trial of this action from manufacturing, producing, publishing, distributing, advertising or selling, offering for sale or otherwise disposing of upholstery fabrics or other goods having designs similar to plaintiff's copyrighted Style 253 specifically including defendant's Styles CK0028 and Fleetwood.

The ground of this motion is that defendant's Styles CK0028 and Fleetwood upholstery fabrics and perhaps other styles of unknown designation constitute an infringement of plaintiff's registered copyright No. Gp 112,119 and that only a preliminary injunction will prevent further irreparable damage and injury to plaintiff pending trial. The motion is based on the annexed Affidavits of Arthur Feinberg, President of plaintiff and James K. Silberman, Esq., the accompanying Memorandum of Law, the Exhibits attached to the Complaint and to the Silberman affidavit and actual samples of the upholstery fabrics which will be displayed to the Court on oral argument of the within motion.

BLUM, MOSCOVITZ, FRIEDMAN & KAPLAN
Attorneys for Plaintiff
730 Third Avenue
New York, New York 10017
(212) 867-2200

By


James K. Silberman

AFFIDAVIT OF ARTHUR FEINBERG SWORN TO DECEMBER
23, 1976

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- - - - -X
NOVELTY TEXTILE MILLS INC., :
Plaintiff, : Civil Action No.
v. :
JOAN FABRICS CORPORATION, :
Defendant. :
- - - - -X

AFFIDAVIT OF ARTHUR FEINBERG

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

Arthur Feinberg, being duly sworn, deposes and says
that:

1. I am president of Novelty Textile Mills Inc.
plaintiff herein.

2. I make this affidavit in support of plaintiff's
Motion for a Preliminary Injunction against the defendant and
enjoining it from infringing one of plaintiff's copyrighted
textile designs. I am familiar with the facts hereafter stated.

3. In about 1952 I was a founder of plaintiff. About
four years ago plaintiff pioneered the commercial acceptance of
course guage warp knitted upholstery fabrics. While those
in the upholstery industry including myself had been dealing in
knitted upholstery fabrics for some years, it was not until
plaintiff introduced a line of course guage warp knitted
upholstery fabrics that such goods came into wide acceptance
and use. Warp knitted fabrics are now widely used in the
upholstery industry and are produced in a wide variety of

qualities, grades, styles and designs.

4. Plaintiff, while not a giant among producers of upholstery fabrics as regards sales volume, has had an ongoing program to design new and attractive upholstery fabrics. As a result of this program, plaintiff has become a style leader in the industry in knitted upholstery fabrics and furniture manufacturers look to plaintiff and to plaintiff's line of upholstery fabrics in gauging the direction being taken by upholstery fabric designs.

5. Substantially all of plaintiff's upholstery fabrics and the designs thereof have been created by plaintiff's personnel and individuals working in close association with plaintiff's personnel. It is the utilization of creative designers by plaintiff that has given plaintiff its leadership position.

6. Plaintiff became aware of others copying its creative designs and in the Fall of 1974 embarked upon a program of copyrighting its new designs. It has caused its new designs to be marked with a copyright notice so that its competitors and those in the trade would be aware of the fact that the designs were protected under the copyright laws of the United States.

7. Plaintiff produces only high quality upholstery fabrics and its reputation in the industry is based not only on its creative designs but on the quality of its goods. Plaintiff's upholstery fabrics are sold principally to manufacturers of upholstered furniture and the major upholstery companies in the United States are among plaintiff's customers. Plaintiff's customers look to plaintiff for the delivery of high quality goods.

8. It is because of plaintiff's established reputation as a style leader in quality goods that plaintiff's upholstery fabrics receive such widespread recognition. It is also the reason why, from time-to-time, unscrupulous competitors infringe our designs and color-ways and often produce their imitations with cheaper yarns or other materials and try in that way to undercut plaintiff's markets and divert its customers. When this happens, substantial and irreparable damage is caused to plaintiff and to its reputation.

9. Plaintiff's Style No. 253 was designed in late 1975 and was made up in seven color-ways denominated as "Cane", "Mocha", "Topaz", "Chocolate", "Alabaster", "Rust" and "Camel". Plaintiff's Style No. 253 is knitted of 100% Olefin fiber. Plaintiff also produces the same design in a different fiber and denominates it as Style No. 256. Since the designs are identical, reference throughout to Style 253 is reference to the design and thus includes both Styles 253 and 256.

10. Style No. 253 has, since the date of first publication, had a statutory copyright notice applied thereto. Yardgoods have the copyright notice imprinted on the reverse side of the fabric while piecegoods used for sample purposes have the copyright notice imprinted on a label which is sewn to the samples.

11. Plaintiff's Style 253 was first shown to the trade in about the first week of January 1976 and color-way samples were made available in January 1976. The first orders for Style 253 were received shortly after introduction as the style was favorably received by those in the industry. The first goods of Style 253 were delivered in about March 1976.

12. A substantial number of manufacturers of upholstered furniture purchased Style 253. Major manufacturers of upholstered furniture who purchased Style 253 included Kroehler, Schnadig, Chadwick, Broyhill, DeVille, Charlton and Montclair.

13. A few months after introduction, Style 253 gained wide acceptance and during the months of July through September 1976 orders for Style 253 were averaging approximately 4800 yards per week.

14. I first knew for a fact that defendant had copied plaintiff's style 253 when I visited the Furniture Show in North Carolina during the period October 19 through 21, 1976. At that time I saw in a number of showrooms an upholstery fabric manufactured by defendant which was indistinguishable in design from plaintiff's Style 253. I immediately attempted to obtain a physical sample of the infringing fabric but was unsuccessful in obtaining it until the third week in November, 1976.

15. Within a week after return from the Furniture Show in North Carolina, I met with plaintiff's attorney to discuss the infringement situation. At that time I also advised him that defendant had been making samples of a number of different designs which were close in appearance to plaintiff's Style 253 since about mid-August 1976 but that the number of different designs which I had seen suggested that defendant was still experimenting and had not finalized on a design. It was not until the time of the market in North Carolina during the third week of October 1976 that I was able to obtain a sample of defendant's Style No. CK0028.

16. The design of defendant's CK0028 is slightly different than the design which I discovered in North Carolina during the period October 19 through 21, 1976. When I finally obtained a sample of what appeared to be the most recent design of defendant, during the third week in November 1976, the sample was marked with the pattern name "Fleetwood" and the color name "Spice". I delivered a sample of defendant's "Fleetwood" to my attorney immediately upon receipt thereof.

17. During the meeting with my attorney on October 28, 1976 I instructed him to obtain a federal registration for the copyright on our Style No. 253 and also authorized him to send notice of infringement to defendant. Such notice was sent on November 5, 1976 but to date defendant has not agreed to withdraw its infringing fabrics and compensate plaintiff for the damage done by reason of its infringing activities.

18. In view of the failure of defendant to withdraw its infringing fabric and in view of the serious damage to plaintiff by reason of the infringement, I instructed our attorneys to bring an action against defendant as soon as possible after issuance of the certificate of registration on Style No. 253. I believe that the certificate was issued by the Copyright Office this week.

19. As of this date, Style No. 253 has enjoyed substantial commercial success. Approximately 85,000 yards of Style 253 have been delivered by plaintiff and sales of Style 253 have exceeded \$450,000. While orders for Style 253 averaged approximately 4800 yards per week during the period July through September, since the commencement of the infringement by defendant, the orders have declined to an average of about

2800 yards per week. Defendant's infringing activities are currently costing plaintiff approximately \$11,000 per week in sales.

20. Since the infringement by defendant, orders for approximately 35,000 yards of Style 253 having a value of approximately \$200,000.00 have been cancelled or have been attempted to be cancelled and customers of plaintiff's Style 253 fabric have either discontinued purchasing Style 253 or have substantially reduced their orders. On information and belief, these customers are purchasing the infringing fabric from defendant.

21. The magnitude of sales lost by plaintiff on account of the infringement is unknown. Not only has the infringement cost plaintiff sales, but the availability of defendant's plagiarized goods in a cheaper grade fabric has made plaintiff's goods less desirable to quality purchasers and has therefore substantially undermined the growing market in plaintiff's Style 253.

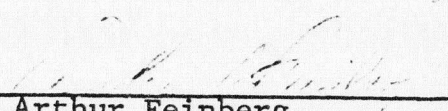
22. A side-by-side comparison of plaintiff's Style 253 with defendant's Styles CK0028 and Fleetwood leave no doubt as to copying. A color photograph of plaintiff's Style 253 in the color "Cane" is annexed to the Complaint as Complaint Exhibit 2. A color photograph of defendant's Style CK0028 in color "Slate" is annexed to the Complaint as Complaint Exhibit 3 and a color photograph of defendant's Style "Fleetwood" in color "Spice" is annexed to the Complaint as Complaint Exhibit 4. Actual samples of the fabrics will be made available for inspection.

23. The side-by-side comparison of the infringing designs of defendant with plaintiff's work shows that the designs were copied substantially stitch for stitch.

24. In view of the affect defendant's goods have had in undermining plaintiff's market for its Style 253, plaintiff

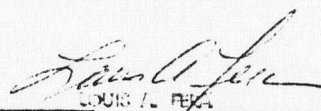
makes this application to the Court for protection against defendant's copyright infringement. I ask for a preliminary injunction in order to avert irreparable injury.

25. No previous application for the relief herein sought has been made.



Arthur Feinberg

Subscribed and sworn to before
me this 23 day of Dec, 1976



Notary Public

Louis L. Fein
Notary Public, State of New York
No. 4505679
Qualified in Suffolk County
Certificate filed in New York County
Term Expires March 30, 1977

AFFIDAVIT OF JOAN A. BEATTY SWORN TO JANUARY 19, 1977

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

DUPLICATE

-----X

NOVELTY TEXTILE MILLS INC. :

Plaintiff, :

v. :

JOAN FABRICS CORPORATION :

Defendant. :

-----X

Civil Action No.

76 Civ. 5753 (HFW)

STATE OF NEW YORK)
: ss:
COUNTY OF NEW YORK)

AFFIDAVIT OF
JOAN A. BEATTY



JOAN A. BEATTY, being duly sworn, deposes and says:

1. I am presently a Vice President of Stanley King Enterprises, Ltd. 261 Fifth Avenue, New York, New York, and have held this position for four years. I have been employed by Stanley King, and his predecessors, in textile design for approximately sixteen years.

2. I studied Textile Designing at Moore College in Philadelphia, Penn. (1955-1959) and worked for approximately one year as a designer and stylist for James May Organization in New York after completing my studies at Moore College.

3. In my capacity as a textile designer and stylist I am well acquainted with various expressions of the well-known argyle or bias plaid basic design being used in various types of textile fabrics.

I have seen and used many expressions of this basic design.

4. Stanley King Enterprises, Ltd. maintains a large collection of textile materials of various designs and also maintains a large collection of books and magazines illustrating textile designs. These materials serve as sources and are available for use by the designers in our office.

5. I have inspected the argyle or bias plaid fabric known as Novelty Textile Mill Style No. 253 and I have also inspected the argyle or bias plaid fabrics manufactured by Joan Fabrics Corporation and involved in this suit.

6. At the request of the Attorneys representing Joan Fabrics Corporation, one of our clients, I have commenced a search of the source material in our office on January 18, 1977, which search is continuing. I have located several argyle or bias plaid designs representing various expressions of this basic design, each of which I believe has been in our collection since before January of 1976. Color photographs of these materials are attached as Exhibits I, II, III and IV and briefly identified below:

Exhibit I is a Xerox copy (color photograph to be furnished as soon as processed) of page 194 of a publication International Textiles Interior dated 1975 and illustrating, as item 6, a fabric described as a "modern multi-frame velours," which fabric including an expression of the well-known argyle or bias plaid design.

Exhibit II is a Xerox copy (color photograph to be furnished as soon as processed) of a fabric sample of style Oxford manufactured by Cohama Decorative Fabrics and incorporating an expression of the well-known argyle or bias plaid design.

Exhibit III is a Xerox copy (color photograph to be furnished as soon as processed) of a fabric sample of pattern 7035 manufactured by Bassett McNab Company and incorporating an expression of the well-known argyle or bias plaid design.

Exhibit IV is a Xerox copy (color photograph to be furnished as soon as processed) of a sample of a velvet fabric incorporating an expression of the well-known argyle or bias plaid design.

Further deponent sayeth not:

Joan A. Beatty

Sworn to before me this
day of January 1977.

Notary Public

A-27

EXHIBITS I, II, III and IV TO BEATTY AFFIDAVIT -
PHOTOGRAPHS OF FABRICS



EXHIBIT I

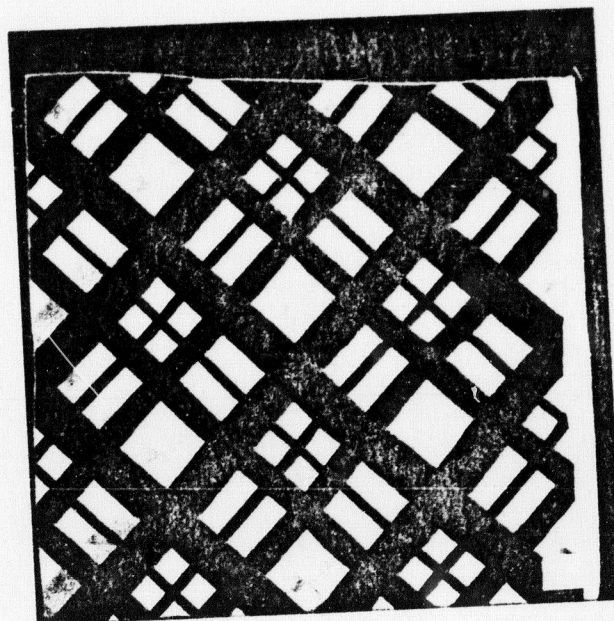


EXHIBIT II

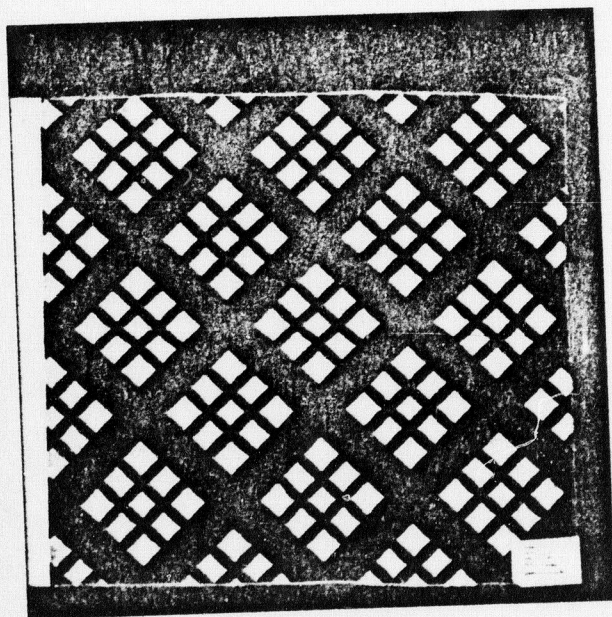


EXHIBIT III

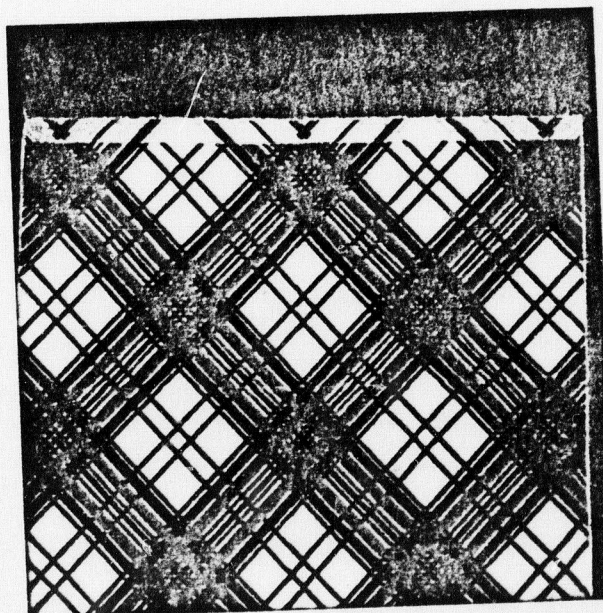
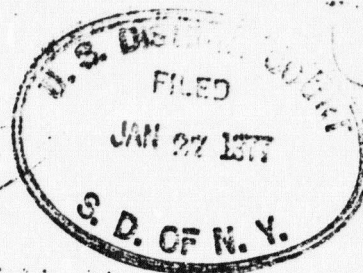


EXHIBIT IV

AFFIDAVIT OF LAWRENCE ANSIN SWORN TO JANUARY 19,
1977

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK



-----X
NOVELTY TEXTILE MILLS, INC.

Plaintiff,

v.

JOAN FABRICS CORPORATION

Defendant.
-----X

Civil Action No.

76 Civ. 5753 (HFW)

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

AFFIDAVIT OF
LAWRENCE ANSIN

LAWRENCE ANSIN, being duly sworn, deposes
and says:

1. I am and have been at all times pertinent to this action an officer of defendant Joan Fabrics Corporation, and am currently President thereof. Joan has for many years been owned and operated by my family, and I have been associated with Joan nearly all my adult life.

2. Defendant is and has been for many years a major supplier of upholstery fabrics to manufacturers of home furnishings. As such, it has and continues to enjoy a reputation for quality, service and originality. Defendant is an integrated operation, having 8 plants scattered over three states, and operates its own yarn processing facilities, dying facilities, coating and backing facilities, weaving facilities and knitting facilities. Defendant also principally owns and operates Cidega - the warp-knit

machinery company producing the machines upon which both plaintiff and defendant manufacture the fabrics in question here.

3. Defendant points with pride to the fact that it has over the years expended a great effort and investment in developing its own fabric designs. Most such designs originate within defendant's inhouse design department, which has grown over the past twenty years to its current staff of ten professional fabric designers. In addition, defendant does from time to time utilize the services of independent design consultants. Between the two, defendant comes up with 250 to 300 new upholstery fabric designs per year.

4. Defendant is familiar with the United States Copyright System, particularly as it applies to textile fabrics, and retains counsel specializing in patents, copyrights, and trademarks. Defendant is the owner of more than 500 Federal Copyright Registrations, and has a regular and ongoing program to secure to itself the full range of protection which the Copyright Laws afford to original textile designs. In this regard, it has been and continues to be defendant's company policy to insist equally that we recognize the rights of others in their designs and that others recognize our rights in our designs.

5. Indeed, each of three of the groups of fabrics in question here is the subject of its own Federal Copyright Registration. Attached hereto as exhibits are copies of such Certificates of Registration: Gp 110432 for style CK-0035; Gp 110433 for

style CK-0028; and Gp 109941 for style CK-0042. As shown by these registrations, these styles were published with suitable copyright notice during the period June-July, 1976.

6. Defendant has known of plaintiff for years, principally as a competitor, but also as a customer for machines and occasionally through a related company as a source for yarns. Traditionally, over the years, there have been several furniture manufacturers who have from time to time purchased fabrics from both plaintiff and defendant.

7. The major marketing events in the home furnishings industry in the United States are the furniture markets held in various cities throughout the country in January, April, and October of each year. It is traditionally the case that suppliers of upholstery fabrics send their sales and design executives to such markets, and defendant is no exception. It is normal practice for defendant's sales, marketing, and design personnel to attend every such market and to see what is offered there. In addition, such personnel bring back from such markets an assessment as to how well defendant's fabrics have been received, and the commentary of defendant's customers who are the furniture manufacturers as to what their needs and desires are in the way of different styles of fabrics. Naturally, such personnel also bring back knowledge as to how well the fabrics of defendant's competitors are being received.

8. Thus, this normal practice was followed in the case of the important Furniture Market held at High Point, North Carolina in April, 1976. Defendant's sales and design personnel who attended such market did see at such market plaintiff's Style No. 253. More importantly, defendant's personnel brought back the commentary of defendant's customers that bias or argyle plaid upholstery fabrics were being well received at the retail level, and that defendant should add an argyle or bias plaid fabric to its line.

9. Thus, in early May, 1976, defendant's management made the decision to add a collection of argyle or bias plaid fabrics to its line. Such would not be the first such fabric in the line, for defendant had made such styles in the past. The decision was also made that such fabrics would be manufactured on a warp-knit machine, which machines are owned and operated by defendant. This bias or argyle plaid knitted fabric was not the first knitted upholstery fabric manufactured by defendant, utilizing such machines.

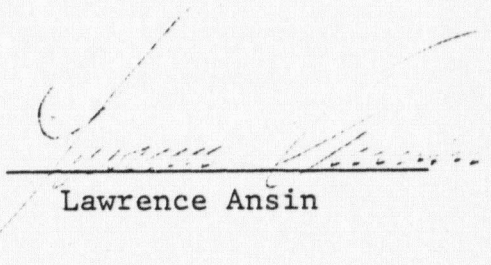
10. At this point, the project was turned over to a committee composed of a marketing specialist (Arthur Zellers), a design specialist (William Ross), and a knitting specialist (Robert Gangi). This committee and each of its members were instructed that our line of plaids should be of our own design and that all modes of change within the capability limitations of the machines should be utilized. They were further instructed that our design must be different

from Novelty Style No. 253. The results of the committee's efforts were fabric Styles CK 0028, CK 0035, CK 0042 and Fleetwood, which during June/August 1976, were published with appropriate copyright notice and samples sent to the trade. Publication and distribution of the samples occurred only after the differences between our designs and plaintiff's Novelty No. 253 were displayed to and passed upon by defendant's copyright counsel.

11. It is not known exactly when defendant first obtained a sample of plaintiff's Style No. 253. It is clear that such a sample was in hand by the middle of June, 1976, just as it is clear that defendant's personnel did see such fabric at the April Market in High Point. Thus, it is believed that such sample was acquired sometime between the end of April and the middle of June. It was not necessary to have a sample to accomplish our own group, and it is believed that such sample was acquired for comparison purposes - not to copy, but to avoid imitation.

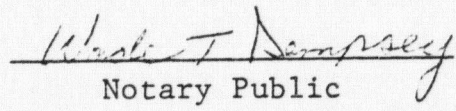
12. Defendant's argyle or bias plaid knitted upholstery fabrics are not and have never been sold as imitations of or as substitutes for plaintiff's Style No. 253. Such fabrics are recognized by defendant's customers as different from plaintiff's fabrics, albeit both are obviously argyle or bias plaids. Defendant's fabrics have been well received, and while they still represent a small portion of defendant's

overall sales, the volume realized in the accused fabrics is increasing steadily.



Lawrence Ansin

Sworn to before me this
19th day of January, 1977.



Notary Public

WADE T. DEMPSEY
Notary Public, State of New York
No. 60-4611449
Qualified in Nassau County
Certificate filed in New York County
Commission Expires March 30, 1977

EXHIBIT V TO ANSIN AFFIDAVIT - CERTIFICATE OF
REGISTRATION OF CLAIM TO COPYRIGHT OF DESIGN
NO. CK-0035

Page 3

Certificate
Registration of a Claim to Copyright
in a work of art or a model
or design for a work of art

This is To Certify that the statements set forth on this certificate have been made
a part of the records of the Copyright Office. In witness whereof the seal of the
Copyright Office is hereto affixed.

Barbara Ringer

Register of Copyrights
United States of America

FORM G

REGISTRATION NO.

GP 110432

DO NOT WRITE HERE

CLASS

G

NOT VALID WITHOUT
COPYRIGHT OFFICE
IMPRESSION SEAL

1. Copyright Claimant(s) and Address(es):

Name Joan Fabrics Corp.Address 122 Western Ave. Lowell, Ma. 01853

Name _____

Address _____

2. Title: "CK-0035"

(Title of the work)

3. Nature of Work: Textile Design

(The general type of artistic work involved, as, for example, painting, drawing, sculpture, etc.)

4. Optional Deposit:

Basis for claiming option:

☐ Monetary value (retail value per copy) _____ ☐ Weight (in pounds) _____
☐ Size (give dimensions) _____ ☐ Fragility (give details) _____

5. Author (i.e., Artist):

Name Joan Fabrics Corp. Citizenship U.S.A. (Del.)

(Legal name followed by pseudonym if latter appears on the copies)

(Name of country)

Domiciled in U.S.A. Yes ☒ No ☐ Address 122 Western Ave. Lowell, Ma. 01853

6. (a) Date of Publication:

June 22 1976
(Month) (Day) (Year)

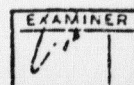
(b) Place of Publication:

(c) Manufacture Outside United States by Lithographic or Photoengraving Process:

U.S.A. _____
(Name of country) (Name of country)

7. Previous Registration or Publication:

Was work previously registered? Yes _____ No _____ Date of registration _____ Registration number _____
Was work previously published? Yes _____ No _____ Date of publication _____ Registration number _____
Is there any substantial NEW MATTER in this version? Yes _____ No _____ If your answer is "Yes," give a brief general statement of the nature of the NEW MATTER in this version:



Complete all applicable spaces on next page

EXHIBIT VI TO ANSIN AFFIDAVIT - CERTIFICATE OF
REGISTRATION OF CLAIM TO COPYRIGHT OF DESIGN
NO. CK-0028

Page 3

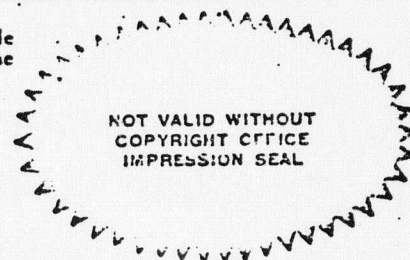
Certificate
Registration of a Claim to Copyright
in a work of art or a model
or design for a work of art

This Is To Certify that the statements set forth on this certificate have been made
a part of the records of the Copyright Office. In witness whereof the seal of the
Copyright Office is hereto affixed.

Barbara Rieger
Register of Copyrights
United States of America

FORM G
REGISTRATION NO.
GP 110433
DO NOT WRITE HERE

CLASS

G

1. Copyright Claimant(s) and Address(es):

Name Joan Fabrics Corp.
Address 122 Western Ave. Lowell, Ma. 01853

Name _____
Address _____

2. Title: "CK-0028" (Title of the work)

3. Nature of Work: Textile Design
(The general type of artistic work involved, as, for example, painting, drawing, sculpture, etc.)

4. Optional Deposit:

Basis for claiming option:

☐ Monetary value (retail value per copy) _____ ☐ Weight (in pounds) _____
☐ Size (give dimensions) _____ ☐ Fragility (give details) _____

5. Author (i.e., Artist):

Name Joan Fabrics Corp. Citizenship U.S.A. (Del.)
(Legal name followed by pseudonym if latter appears on the copies) (Name of country)
Domiciled in U.S.A. Yes No _____ Address 122 Western Ave. Lowell, Ma. 01853

6. (a) Date of Publication:

June 14 1976
(Month) (Day) (Year)

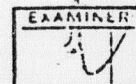
(b) Place of Publication:

(c) Manufacture Outside United States by Lithographic
or Photoengraving Process:

U.S.A. _____
(Name of country) (Name of country)

7. Previous Registration or Publication:

Was work previously registered? Yes _____ No _____ Date of registration _____ Registration number _____
Was work previously published? Yes _____ No _____ Date of publication _____ Registration number _____
Is there any substantial NEW MATTER in this version? Yes _____ No _____ If your answer is "Yes," give a brief general
statement of the nature of the NEW MATTER in this version: _____



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EXHIBIT VII TO ANSIN AFFIDAVIT - CERTIFICATE OF
REGISTRATION OF CLAIM TO COPYRIGHT OF DESIGN
NO. CK-0042

Page 3

Certificate
Registration of a Claim to Copyright
in a work of art or a model
or design for a work of art

FORM-G

REGISTRATION NO.

GP 105941

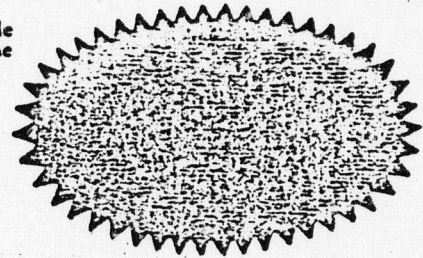
DO NOT WRITE HERE

CLASS

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This is To Certify that the statements set forth on this certificate have been made
a part of the records of the Copyright Office. In witness whereof the seal of the
Copyright Office is hereto affixed.

Barbara Rieger
Register of Copyrights
United States of America



1. Copyright Claimant(s) and Address(es):

Name Joan Fabrics Corp.Address 122 Western Ave. Lowell, Ma. 01853

Name _____

Address _____

2. Title: "CK-0042" (Title of the work)3. Nature of Work: Textile Design
(The general type of artistic work involved, as, for example, painting, drawing, sculpture, etc.)

4. Optional Deposit:

Basis for claiming option:

☐ Monetary value (retail value per copy) _____ ☐ Weight (in pounds) _____
☐ Size (give dimensions) _____ ☐ Fragility (give details) _____

5. Author (i.e., Artist):

Name Joan Fabrics Corp. Citizenship U.S.A. (Del.)
(Legal name followed by pseudonym if latter appears on the copies) (Name of country)Domiciled in U.S.A. Yes ☒ No ☐ Address 122 Western Ave. Lowell, Ma. 01853

6. (a) Date of Publication:

July (Month) 26 (Day) 1976 (Year)

(b) Place of Publication:

(c) Manufacture Outside United States by Lithographic or Photoengraving Process:

U.S.A. (Name of country) _____ (Name of country)

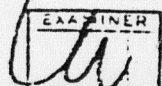
7. Previous Registration or Publication:

Was work previously registered? Yes _____ No _____ Date of registration _____ Registration number _____

Was work previously published? Yes _____ No _____ Date of publication _____ Registration number _____

Is there any substantial NEW MATTER in this version? Yes _____ No _____ If your answer is "Yes," give a brief general statement of the nature of the NEW MATTER in this version:

Complete all applicable spaces on next page



AFFIDAVIT OF ARTHUR ZELLERS SWORN TO JANUARY
19, 1977

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X

NOVELTY TEXTILE MILLS, INC. :

Plaintiff, :

v. :

Civil Action No.

JOAN FABRICS CORPORATION :

76 Civ. 5753 (HFW)

Defendant. :

-----X

STATE OF NEW YORK)

: ss:

COUNTY OF NEW YORK)

AFFIDAVIT OF
ARTHUR ZELLERS

ARTHUR ZELLERS, being duly sworn, deposes
and says:

1. I have been employed by Joan Fabrics Corporation for more than twenty years, and am Executive Vice President thereof. I am primarily responsible for Joan's marketing program and am in charge of Joan's New York city offices.

2. Based upon my years of experience in marketing the upholstery fabrics manufactured by Joan and upon my contacts with the furniture manufacturers who are Joan's customers, I believe that Joan enjoys a reputation as a manufacturer of quality upholstery fabrics, and as an innovator of attractive upholstery fabric designs, which designs have in large numbers been enthusiastically and successfully received by the furniture buying public.

3. It has for years been our practice to

send members of the marketing staff, myself included, to the furniture markets held throughout the United States and Europe each year. We attend such markets to continue good relations with our furniture manufacturing customers, to assess the ways in which our fabrics are being received, and to ascertain trends in the industry. In this regard, we gather information as to how our competitors' fabrics are being received and as to the express needs and desires of our customers for additional types and designs of fabrics.

4. We usually utilize the information gained from attendance at furniture markets in planning changes to our product lines, and this is normally accomplished immediately following the conclusion of a market. This is so because it takes time to develop new fabric designs, and to place the fabrics on furniture, which is principally introduced at the various markets held in January, April, and October of each year. Thus, if we are to have samples of a new fabric to our manufacturing customers in time for them to make a decision whether or not to display our fabric on their furniture at the next market, we must make new design decisions and implement such decisions quickly following the close of any given market.

5. I did attend the important furniture market at High Point, North Carolina, in April, 1976, and I do recall that I saw Novelty No. 253 at such market. It is possible that I may have seen such

fabric earlier - probably at the San Francisco market in January, 1976. At the April market in High Point we received comments from a number of our customers to the effect that bias or argyle plaids were returning to popularity, particularly as expressed when produced on knitting machines. Our customers indicated to us that we ought to have a knit argyle plaid fabric in our line.

6. Following the close of the High Point market, I participated in the decision made at Joan in early May, 1976 to go forward with the development of our own argyle plaid design. It was also decided that such fabric would be knit, since we had within the past year developed and marketed other knit fabrics and had recently acquired a knitting capability.

7. As is normal in the case of new fabric design decisions, I was a member of the three man team charged with the responsibility for development of our knit argyle or bias plaid fabric. The other members of the team were William Ross and Robert Gangi. In line with our long standing policy that our designs should be our own, we were instructed that the design we eventually decided upon should be unlike any others in the market.

8. During the May - June, 1976 period, we proceeded to set up and make a considerable number of samples of possible knit plaid designs, with Robert Gangi having the principal responsibility for implementing such designs within the capabilities and

limitations of our Cidega warp knit machines. I saw almost all of these samples, and gave my comments and suggestions with regard to other things to try in seeking improvements.

9. By the middle of June 1976 and during the succeeding several weeks, we arrived at our final designs which became our styles CK 0028, CK 0035, CK 0042 and Fleetwood. We accepted these designs for marketing sample purposes and implemented a sampling program to our customers based upon our judgment that these fabrics were indeed our own version of the bias plaid design, our judgment that they would be well received by our customers, and the advice of our counsel that such designs were sufficiently different from Novelty No. 253, that they should not infringe any copyright which Novelty might have.

10. I do not know when we first received a sample of Novelty No. 253, and we have no records that I am aware of that would indicate when we received such sample. I know that we did have such sample by mid-June 1976, and I know that we did use such sample to compare with our own designs for the purpose of determining the nature and extent of the differences there between.

11. At any rate, we went forward with a full set of color combinations and these several fabrics, and sent samples to our customers throughout the summer of 1976. The colors which we selected were in major part determined by the available colors already in our line and by the needs and desires of

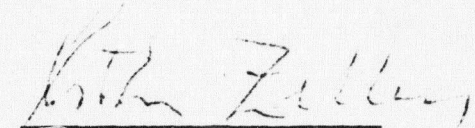
our customers.

12. Joan's bias plaid knit fabrics style Nos. CK 0028, CK 0042 and Fleetwood have been well received by many of our customers, and while our total sales still represent a relatively small portion of our overall sales, orders for such fabrics are increasing. The fabrics comprising style CK 0035 were not well received by our customers, apparently because they felt that the bold contrasting stripe was too bold and did not give a successful appearance from the retail point of view. According to our records, only 38 yards of CK 0035 were ever sold.

13. All of these styles and color combinations of argyle plaid fabrics have never been sold as imitations of, or as substitutes for, Novelty No. 253. However, as is always the case in marketing Joan fabrics, we present these fabrics as our own design - our own version of the basic argyle plaid or bias plaid design. Based upon my contacts with our customers, it is clear that our customers recognize that they are different in their effect and appearance from those of Novelty.

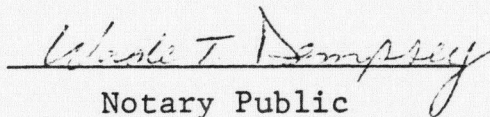
14. Indeed, based upon comments from our customers, it is apparent that they recognize differences among and between the several portions of our line of knit argyle plaid fabrics. These differences come from several sources such as the different yarns used in CK 0028 as against CK 0042,

for example. Other differences relate to the different color combinations used.



Arthur Zellers

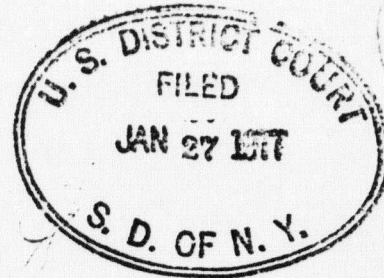
Sworn to before me this
19th day of January 1977.


Notary Public

WADE T. DEMPSEY
Notary Public, State of New York
No. 30-4611449
Qualified in Nassau County
Certificate filed in New York County
Commission Expires March 30, 1977

AFFIDAVIT OF WILLIAM A. ROSS SWORN TO JANUARY
19, 1977

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK



-----X
NOVELTY TEXTILE MILLS, INC. :
Plaintiff, : Civil Action No.
v. : 76 Civ. 5753 (HFW)
JOAN FABRICS CORPORATION, :
Defendant
-----X

STATE OF NEW YORK)
: ss.
COUNTY OF NEW YORK)

AFFIDAVIT OF
WILLIAM A. ROSS

WILLIAM A. ROSS being duly sworn, deposes and
says:

1. I am a graduate of the Rhode Island School of Design, majoring in Textile Design, and have been employed in the design department of Joan Fabrics Corporation for about twenty years. For the last ten years, I have been Director of Joan's Design Department, and over that period have seen our staff grow to its present size of eight professional designers and numerous support personnel.

2. Nearly all of Joan's new fabric designs are developed within the Design Department, and some 250 to 300 new designs per year originate there. In addition, we occasionally make use of outside independent design consultants, such as the Stanley King Agency of New York. We have a program of seeking copyright protection for our designs, and most of our new designs are forwarded to

counsel for the purpose of obtaining a Federal copyright registration thereon.

3. The sources of inspiration for our new designs are multiple, but are mainly contained within the research library maintained by our Design Department. In such library are to be found a complete collection of all past fabrics manufactured by Joan, a collection of fabrics manufactured by competitors of Joan, a collection of fabrics and other materials such as wallpaper which are purchased on the open market, collections of fabrics purchased from sources who offer such collections to fabric manufacturers, numerous upholstery and furniture trade journals and magazines, and numerous text books and other works on fabric and fabric design.

4. Novelty Style No. 253 is a particular version of a basic fabric design which has to my knowledge been around for years, and which is called by many an argyle plaid and by others a bias plaid. The Joan fabrics involved in this matter are also versions of this same common argyle or bias plaid theme. These particular plaid fabrics are not the first that Joan has developed and manufactured. For example, the fabrics shown in photographic exhibits AD and AL are bias plaid fabrics developed by Joan prior to 1976. These particular fabrics happen to be woven fabrics, and as usual, the nature and extent of the design is influenced by the inherent capabilities and limitations of the machines upon which the fabrics are manufactured. In these instances, those machines are looms.

5. The Joan argyle or bias plaid fabrics which are involved here are presented in several styles, and in several color combinations within each style. As is apparent from observation, each of these styles differs from the other, and within a given style, particular color combinations can and do create different effects. Our style CK 0028 is presented in twelve color combinations, as shown by photographic Exhibits A through L, and our style "Fleetwood" is presented in five color combinations, as shown by photographic Exhibits M through

Q. Style "Fleetwood" differs from CK 0029 principally in that in "Fleetwood" there is included within the broad striated stripes a complementary or contrasting color in the center of such stripe. Our style CK 0042 is shown in photographic Exhibits W and X, and differs from CK 0028 principally in that different yarns are used thereby giving a slightly different surface effect and appearance. Our style CK 0035 is shown in photographic Exhibits T through V and differs from the other styles in that the broad stripes are not striated, but rather include a bold contrasting center stripe. Style CK 0035 is no longer in our line, because it was not well-received by our customers.

6. The fabrics shown in photographic Exhibits AO through AV are exemplary of various versions of the basic argyle or bias plaid theme. These fabrics are from our Design Department collection and were manufactured by others. It is believed, according to my best recollection, that each of such fabrics has been in our collections since before 1976.

7. Taken together, Joan's plaid fabrics and the examples of plaid fabrics made by others illustrate that there are only so many ways that the basic elements of an argyle or bias plaid can be changed, and still remain an argyle or bias plaid. Basically these ways are as follows:

- (1) Any of the series of parallel lines which intersect with each other to form diamond shaped spaces can be varied in width or in internal composition;
- (2) The background material upon which the plaid pattern is imposed can be varied in color or in internal composition;
- (3) The size of the diamond shaped spaces formed by the intersections of the series of parallel lines can be varied, within the limitations and capabilities of the machines upon which such fabric is made; and
- (4) The shape of the diamond shaped space can be varied so as to be more nearly square, or so as to be a highly flattened and elongated diamond.

8. Members of our professional design staff attend every important furniture market held in the several cities in the United States each year, and in addition attend one or more important furniture markets in Europe

each year. I attend many of such markets, myself, for the purpose of ascertaining both how our fabrics are being received and for the purpose of ascertaining trends in the types of fabric designs required by the furniture industry. I did attend the furniture market held at High Point, North Carolina in April 1976, and I recall that I did see Novelty Style No. 253 while there.

9. After such market, in May 1976, Joan made the decision based upon customer requests to develop its own variation of the argyle or bias plaid design. As is usually the case, I was assigned as a member of a three man committee charged with the responsibility for coming up with our own design. The other two members were Arthur Zellers and Robert Gangi. Throughout the remainder of May and the first part of June of 1976 I participated in the design development process, and saw most of the samples which were prepared by Robert Gangi at our New Jersey knitting plant. Drawing upon my experience in the design field, including the design of bias plaid fabrics, I offered my reactions and suggestions, to the end that we could achieve a design which was our own, and which could successfully be made on our Cidega knitting machines, and which would be acceptable to the furniture trade. Numerous changes were made from sample to sample, and by the middle of June we had accomplished the design of the fabrics which are involved in this matter.

10. I do not know when Joan obtained a sample of Style No. 253, but I do know that we had such a sample by June 1976. We used such sample to compare with our fabrics, to be sure that we had complied with our instruc-

tions and our basic philosophy that all of our designs should be our own and should be different from any others on the market.

11. Comparing our style CK 0028 with Novelty's No. 253, the following differences are apparent:

(1) Our broad stripes are broader than those of Novelty.

(2) Our broad stripes are striated, where those of Novelty are solid and uniform.

(3) Our diamond shaped spaces are smaller both horizontally and vertically than those of Novelty, thus achieving a flatter more classical diamond shape as opposed to Novelty's more nearly square shape;

(4) At the point where the apex of one zig-zag meets the apex of another in our fabrics the juncture is carefully aligned so as to achieve a continuous thread appearance such as in woven cloth, whereas it is usually the case that such juncture in the Novelty fabric results in an overlap;

(5) Our background is more uniform than Novelty's, and covers the base fabric and coating, whereas Novelty's use of snub yarns presents a highly non-uniform appearance and permits

the coated base fabric to show through at many points;

(6) The yarns utilized in our plaid pattern are smoother and less highly textured than those of Novelty, thereby achieving a smoother and less "homespun" appearance.

12. Thus, in achieving our own designs based upon the argyle or bias plaid theme, we have utilized all of the various ways that such a design can be changed while still remaining a plaid design. As is always the case, the magnitude of changes which can be introduced is circumscribed by the inherent capabilities and limitations of the machine upon which the fabric is to be made.

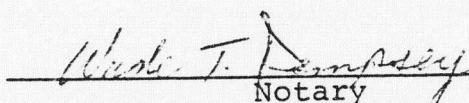
13. There are, of course, some similarities between CK 0028 and No. 253. Generally, these similarities can be ascribed to the fact that both fabrics are variations upon the same basic argyle plaid theme. Other similarities are due to the fact that both fabrics are made on the same machines - Cidega warp-knit machines. In a few instances, similarities occur because of the use of similar yarn color combinations. Available yarn colors are in major part prescribed by those companies which manufacture the unprocessed yarn, and are otherwise prescribed by the furniture manufacturers who generally prefer to utilize those colors which are traditional for various sorts or modes of furniture. For example, there is a traditional range of colors which are utilized with early American furniture, and most fabrics purchased by

early American furniture manufacturers are within this traditional range of colors.



William A. Ross

Sworn to before me this 19th
day of January, 1977.



Notary

WADE T. DEMPSEY
Notary Public, State of New York
No. 30-4511449
Qualified in Nassau County
Certificate filed in New York County
Commission Expires March 30, 1977

AFFIDAVIT OF ROBERT J. GANGI SWORN TO JANUARY
20, 1977

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X

NOVELTY TEXTILE MILLS, INC., :

Plaintiff, :

v. :

Civil Action No.

JOAN FABRICS CORPORATION, :

76 Civ. 5753 (HFW)

Defendant. :

-----X

STATE OF NEW YORK)

: ss:

COUNTY OF NEW YORK)

AFFIDAVIT OF
ROBERT J. GANGI

ROBERT J. GANGI, being duly sworn, deposes
and says:

1. Since February, 1976, I have been employed by defendant, Joan Fabrics Corporation. Until recently, I was responsible for production of knit fabrics at Joan's plant in Waldwick, N.J., with additional responsibilities involving the development of new fabric designs - particularly machine set-ups for sample preparation. At present, I am primarily involved in marketing.

2. Prior to employment by Joan, my brother, Richard, and I owned Tri-R fabrics, a company acquired by Joan in February, 1976. From 1971 onward, at Tri-R, I had responsibilities in both manufacturing and marketing fabrics knit on Cidega warp-knit machines for the drapery, apparel and upholstery trades. While there, I helped develop a warp-knit Bargello upholstery fabric.

3. Prior to founding Tri-R together with my brother, I worked for Cidega Machine Company - a manufacturer of warp-knit machines founded by my father in 1934.

At Cidega, I was heavily involved in the design and development of these machines. I was aware that plaintiff Novelty Textile Mills was a customer for Cidega machines, as was its predecessor, Powdrell and Alexander.

4. Cidega was also acquired by Joan in February, 1976. My brother, Richard, continues to have major responsibilities at Cidega, and I am aware that Novelty continues to be a customer for machines and parts.

5. In addition, in the late 1960's, my brother and I owned a dress shop called "Ladies' Knitwear Factory Outlet." There is now in our plant in Walldwick a dress left over from that store which is made of knit fabric having a bias plaid design, which will be available as an exhibit in this action. It is my recollection that such dress was purchased from Alphabet Unlimited, and it is my belief that Alphabet was at that time a company affiliated with Novelty.

6. My relationship with Joan Fabrics commenced about June, 1975, when Joan purchased a Cidega machine. In September, 1975, Tri-R began development of several overstitched upholstery fabrics for Joan, and toward the end of 1975, we began manufacturing for Joan a version of the Bargello upholstery fabric which had been originated at Tri-R earlier. Both of these fabrics will be available for use as exhibits.

7. The letters "CK" in style numbers such as CK0028 stand for "Cidega Knit". Thus, for example style no. CK0028 was the twenty-eighth warp-knit upholstery fabric design developed at Joan. Similarly, style CK0042 is the forty-second such design. More

recently, we have discarded the numbers and have gone to assigning names to such fabrics, such as "Fleetwood", which was one of the first. I participated in the development of each of these fabric designs, as I continue to do by reason of my familiarity with the machines.

8. I believe I may have first seen Novelty Style No. 253 upholstery fabric - the design called bias plaid by some and "double-diamond" by others - at the San Francisco Furniture Market in January, 1976. I am more certain that I saw No. 253 at the High Point Furniture Market in April, 1976, and recall hearing comments from customers inquiring as to when Joan would develop its own argyle or bias plaid design. I do not know when Joan first acquired a sample of No. 253, but recall seeing such sample at least by June, 1976.

9. After Joan management had made the decision in May, 1976 to develop its own bias plaid design, I was part of the three-man team assigned to the project. The others were Arthur Zellers and William Ross. We were instructed by the President of the company to see to it that such fabric was our own design different from anyone else's, in keeping with Joan's policy of design innovation.

10. I believe that I set up on a Cidega the first sample of a bias plaid about the middle of May, 1976. Knowing the machines as I do, I was able to do this without anything in front of me as an example or by way of instructions. This sample, like six or more thereafter, was rejected as not having a unique enough appearance.

11. In working up these samples, I would in each instance seek the reaction and suggestions of both

Messrs. Zellers and Ross. Finally, toward the middle of June, 1976, we achieved the designs which became styles CK0028, CK0035, and CK0042. We all agreed that the designs were ours and were different from any others including those of Novelty, and that such samples should be of a type which would be acceptable to our customers.

12. The differences between our CK0028 and Novelty 253 are as follows:

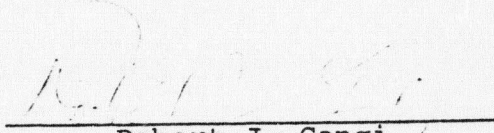
- a) Our broad stripe is broader;
- b) Our broad stripe is internally striped;
- c) The yarn in our stripes is less bulky, thereby giving a smoother and less home-spun appearance;
- d) Our diamond-shaped spaces are just that and not nearly so square as those of Novelty. In addition, they are smaller both horizontally and vertically.
- e) Our background yarns are uniform and not slub yarns as Novelty uses. Thus our backing fabric does not show through as does Novelty's;
- f) The apexes of our zig-zag lines are precisely aligned so as to give a continuous thread woven look, whereas in No. 253 the apexes usually overlap;
- g) Our stitch construction is not the same stitch-for-stitch as Novelty's. This requires a knowledge of the Cidega machine to fully understand.

13. The overall effect of these differences has been recognized by Joan's customers. Indeed, I have heard of more than one such customer who refused to buy our fabric because it was so different from No. 253. Others have liked it because it does present such a different appearance. To my knowledge, our fabric has never been sold as a substitute for, or imitation of, No. 253. Rather, it is sold as our own version of a bias plaid fabric .

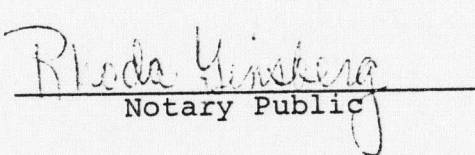
14. Over the years at Cidega, at Tri-R, and now at Joan, we have collected samples of many fabrics. Some are our own, some were our customer's, and some were made by competitors. Many of these have diamond or double diamond patterns, since Cidega machines are inherently capable of making zig-zags and diamonds. I have instructed certain employees to search our collections and such search continues. Those fabrics located will be available as exhibits in this action.

15. Cidega machines have over the years been made and sold in various sizes and degrees of complexity and capability. They all make fabrics having patterns composed of zig-zag, diamonds, contoured zig-zags such as bargellos, and the like. Depending on the model, it is possible to vary the size of the diamonds from approximately 1/2 inch across up to approximately 8 inches. It is also possible to vary line width in a pattern like CK0028 from a single thread up to 2 or 3 inches. Naturally, one can also vary yarn color and character, and it is possible to vary the angularity of the zig-zag or the shape of the diamond.

16. We utilized each of these variables in achieving Joan's bias plaid fabrics CK0028, CK0035, CK0042, Fleetwood, and Electra. As is apparent from observation, these styles also differ from each other, and yarn color often serves to amplify the differences.


Robert J. Gangi

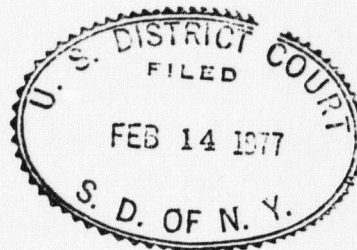
Sworn to before me this
26th day of January, 1977.


Notary Public

RHODA GINSBERG
NOTARY PUBLIC, State of New York
No. 31-1440030
Qualified in New York County
Commission Expires March 30, 1977

gws

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK



-----x
NOVELTY TEXTILE MILLS, INC.,

Plaintiff,

-against-

JOAN FABRICS CORPORATION,

Defendant.
-----x

76 Civ. 5753

Before:

HON. HENRY F. WERKER,

District Judge.

New York, January 20, 1977;
2.00 o'clock p. m.

APPEARANCES:

BLUM, MOSCOVITZ, FRIEDMAN & KAPLAN, Esqs.,
Attorneys for Plaintiff
730 Third Avenue
New York, New York

BY: JAMES K. SILBERMAN, Esq.,
Of Counsel.

KAYKE, SCHOLER, FIERMAN, HAYS & HANDLER, Esqs.,
Attorneys for Defendant
425 Park Avenue
New York, New York

BY: ETTIE WARD, Esq.,

and

1 gws

2 BELL, SELTZER, PARK & GIBSON, Esqs.,
1211 E. Morehead Street
3 Charlotte, North Carolina

4 BY: FLOYD A. GIBSON, Esq.,
JOEL T. TURNER, Esq., and
JULIAN E. CARNES, JR., Esq.,
5 Of Counsel.

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9 THE COURT: Good afternoon.

10 MR. SILBERMAN: Good afternoon, your Honor.

11 I am James Silberman of the firm of Blum,
12 Moscovitz, Friedman & Kaplan. We are here on a motion
13 on behalf of our client, Novelty Textile Mills, for a
14 preliminary injunction.

15 THE COURT: You can stop right there. I have
16 read your papers. I don't want any preliminaries.

17 Whatever is said and done here today will form
18 a part of the ultimate trial on the merits, and I will take
19 your first witness.

20 MR. SILBERMAN: All right, your Honor.

21 I call Mr. Arthur Feinberg.

22 MS. WARD: Excuse me, your Honor. Before we
23 start, my name Ettie Ward. I am associated with the law
24 firm of Kaye, Scholer, Fierman, Hays & Handler.

25 I would like to introduce my colleagues to the

1 gws

2 Court.

3 This is Mr. Floyd Gibson, Mr. Joel Turner and
4 Mr. Julian Carnes, all members of the firm of Bell, Seltzer,
5 Park & Gibson, North Carolina law firm. All three of
6 these gentlemen are admitted members of the Bar of North
7 Carolina and admitted to practice before the Courts of that
8 state and before the District Court, Federal court of the
9 Western District of North Carolina. Mr. Gibson is also
10 a member of the Bar of the Third and Fourth Circuits and
11 the United States Supreme Court.

12 I would like to move their admission to appear
13 before this Court for purposes of this action pursuant to
14 general Court Rule 3-C.

15 THE COURT: I will admit them pro hac vice.

16 MS. WARD: Thank you, your Honor.

17 MR. GIBSON: Also, your Honor, before proceeding
18 I would like to hand up to this Court at this time verified
19 affidavits to replace the unverified affidavits and an
20 addendum to Volume 1.

21 I have copies for Mr. Silberman.

22 THE COURT: Fine.

23 MR. SILBERMAN: Your Honor, I object to receipt
24 of these papers at this time.

25 This was a motion in which they had in excess

1 gws

2 of 20 days notice. It is a normal 10 days notice.

3 Their answering papers are required to be served three days
4 prior to the trial.

5 I received their brief two days prior to the
6 trial, two days ago, at 4.30 p.m. I received that black
7 volume that they also handed Up at 5.28 p.m., also two days
8 ago.

9 The various affidavits of Mr. Zellers I received
10 the 19th, yesterday, at 5.11 p.m., unverified and incomplete;
11 the affidavit of Mr. Ross I received yesterday at 5.11 p.m.;
12 the affidavit of Joan Beatty I received on the 18th at
13 5.28 p.m., two days ago; the affidavit of Lawrence Ansin
14 I received two days ago at 5.28 p.m.; the affidavit of
15 Robert Gangi I received yesterday at 5.11 p.m.

16 All the affidavits are unverified. The docu-
17 ment in the black volume has no support whatsoever in any
18 of the papers that have been untimely served on me.

19 THE COURT: I presume that you want to try this
20 matter on the merits rather than on technical objections.
21 I am going to receive them.

22 MR. SILBERMAN: Yes, your Honor, fine.

23 THE COURT: You may call your first witness.

24 MR. SILBERMAN: Mr. Arthur Feinberg.

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1 gws

2 A R T H U R F E I N B E R G , called as a witness on
3 behalf of the plaintiff, having been first duly sworn,
4 was examined and testified as follows:

5 DIRECT EXAMINATION

6 BY MR. SILBERMAN:

7 Q Mr. Feinberg, where do you reside, please?

8 A 65 Neptune Drive, Groton, Connecticut.

9 Q What is your business?

10 A Manufacturing of knitted fabrics.

11 Q By whom are you employed?

12 A I'm the president of Novelty Textile Mills of
13 Wauregan, Connecticut.

14 Q Is the Novelty Textile Mills that you mentioned
15 the plaintiff in this action?

16 A Yes, it is.

17 Q How long has Novelty Textiles been in existence?

18 A Since 1952.

19 Q By whom was it started?

20 A Started by myself.

21 Q Are you the sole stockholder?

22 A Yes, I am.

23 Q Approximately how many people are employed by
24 Novelty?

25 A Approximately 100.

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Feinberg - direct

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Q What is the business of Novelty?

A Well, we manufacture knitted fabrics for various trades, including the upholstery furniture trade.

Q What other trades?

A Women's apparel, industrial fabrics, military fabrics, other special types of fabrics.

Q Do you manufacture, and when I say "you," I mean Novelty, fabrics other than knitted fabrics?

A No.

Q You say that Novelty is in the business of manufacturing knitted upholstery fabrics; is that correct?

A Yes, we are.

Q How long has Novelty been manufacturing knitted upholstery fabrics?

A Actually we have made some starts in it back and forth for many years going back over 20 years, but I wouldn't consider those actually valid because there was no continuity involved. We started successfully to manufacture in 1973.

Q To manufacture knitted upholstery fabrics?

A Knitted upholstery fabrics.

Q Does Novelty design the knitted upholstery fabrics that it manufactures?

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Feinberg - direct

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A Yes, it does.

Q Who does that design work generally?

A At the present time we have a designer, Geraldine Scalone, my son, Ira Feinberg, and myself.

Q How many knitted upholstery fabrics has this design group designed since the period of 1973?

A Well, Geraldine Scalone has only been with us since the summer of 1975. It's a matter of how many we designed, what we designed and worked on that we offered for sale. I'm not sure what you mean.

Q Approximately how many did you design?

A A few hundred.

Q How many of those ended up being offered for sale?

A About 20 percent.

Q What percentage of that have actually become commercially successful?

A About 80 percent.

Q 80 percent of the 20 percent?

A Right.

Q In other words, that's 16 percent of the total designs that are created actually become commercial fabrics?

A That's right.

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Feinberg - direct

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Q Does Novelty own knitting machines known as Cidega machines?

A We own warp-knitting, crochet machines which are manufactured by the Cidega Machine Manufacturing Company, which I believe is the exact name.

Q Are all of the warp-knitting machines owned by Novelty Cidega machines?

A No.

Q Can Cidega machines produce fabrics other than upholstery fabrics?

A Certainly.

Q How long have knitted upholstery fabrics been generally used in the upholstery industry?

A I presume you are referring to warp-knit upholstery fabrics made in Raschel-crochet type machines.

Q Like the Cidega.

A Well, in commercial quantities, since we introduced it in 1973, not prior.

Q By anyone?

A No.

Q Why is that?

A I don't know. I know duPont had a survey made in which they determined that warp-knit crochet machines were not suitable for manufacturing of upholstery

1 ws5 Feinberg - direct 9
2 fabrics. They had a large survey made and they came to
3 that conclusion.

4 MR. GIBSON: Objection to him stating what
5 DuPont's conclusion was, your Honor; move to strike.

6 THE COURT: Sustained. It's struck.

7 A (Continuing) Why it is -- I can't really say
8 why it is. I just know it's a factor. There have been
9 other companies that had attempted it. As I mentioned,
10 I had attempted it.

11 I had made small amounts of fabric. Other
12 companies had made small amounts of fabric which had
13 proved to be unsatisfactory for the intended use. I can't
14 really answer. Maybe the time wasn't right.

15 Q Is there any special treatment that must be
16 given to a warp-knitted upholstery fabric in order to make
17 it suitable for upholstery?

18 A The types of fabric we made must be rubberized,
19 they must have a latex or similar coating on the back.

20 Q A layer is put on the back of the knitted
21 fabric after the knitting step is completed?

22 A Yes.

23 0 Is that correct?

24 A Yes.

25 Q Is that process performed by Novelty?

1 ws6 Feinberg - direct 10

2 A No we do not perform that process. We
3 send it to others.

4 Q How are those others generall described in
5 the company?

6 A The name of the company is Synthetic Finishing
7 of North Carolina. They do a very large percentage of
8 this type of work for all the upholstery manufacturers,
9 jobbers or converters who do not have their own facilities.

10 Q Where are the knitted upholstery fabrics of
11 Novelty manufactured?

12 A In Wauregan, Connecticut.

13 Q 100 percent?

14 A 100 percent.

15 Q And they are sent to the finishing company to
16 have the finishing done?

17 A Right, to Hickory, North Carolina.

18 Q Who does the shipping to customers of the
19 finished upholstery fabrics?

20 A Synthetic Finishing.

21 Q Who invoices the customers?

22 A Novelty Textile Mills.

23 Q Does Novelty have a program of protecting its
24 new designs by copyright under the copyright laws of the
25 United States?

1 ws7

Feinberg - direct

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2 A Yes, we do.

3 Q When was that program initiated?

4 A The program was initiated two or three years
5 ago when I came to visit you to discuss this situation.
6 You gave me the advice of how to go about copyrighting
7 fabrics, and from that time forward we followed the
8 procedures you outlined.

9 Q When you say "to discuss this situation," what
10 situation do you have reference to?

11 A Well, we had a situation where we had successful
12 fabrics which there had been attempts to copy using other
13 types of equipment and there had been a lot of talk in the
14 trade about the copyrighting.

15 I felt that it would be a good idea for us to
16 copyright our fabrics. I just wanted to learn more about
17 it, the feasibility, et cetera.

18 Q What steps or procedures do you, Novelty, take
19 in order to copyright fabrics?

20 A Well, the first thing is that all of our
21 fabric on the back along the selvage has written on it
22 "Copyright, Novelty Textile Mills, Incorporated."

23 In addition, any sample that we send out has
24 a label sewn onto it, and on the label is printed, together
25 with various other information, "Fabric copyright."

1 gws Feinberg - direct 12

2 Q How long has this practice been ongoing?

3 A Two or three years.

4 Q Do you have a fabric in your line, the line

5 of Novelty, known as Style No. 253?

6 A Yes, we do.

7 Q How long has that style number been on the

8 market?

9 A We first introduced that fabric in January

10 1976.

11 Q Who designed that fabric?

12 A The fabric was designed by Geraldine Scalone,

13 Arthur Feinberg and Ira Feinberg.

14 Q Were you involved in all phases of the design

15 of that fabric?

16 A Every step.

17 Q Can you describe for us what steps you took

18 in reaching the design known as Style 253?

19 A Yes, I can. Our prior successes in the

20 upholstery fabric industry up to that point in time, which

21 was in July, August and September of 1975, had been in

22 flame stitches and chevrons. We were extremely success-

23 ful. We felt, and a lot of our customers felt, we

24 should be doing some things in addition to flame stitches

25 and chevrons.

1 gws

Feinberg - direct

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2 We gave a lot of thought and discussion, had
3 meetings, research on what we thought would be a good
4 area for us to go into both from the viewpoint of what
5 would be acceptable to the market and what would be some-
6 thing that would fit in with our particular abilities.

7 We decided that we would make some kind of
8 an Argyle bias plaid. That was a matter of discussion
9 between Geraline, Ira, myself, discussions with our sales
10 people, even talking, getting to our customers and asking
11 them what they thought of it, different possibilities.
12 Many, many things were mentioned in these discussions
13 besides this one thing. We are only focusing on the
14 one.

15 Q Let me interrupt you there for the moment.

16 When you say your customers, what type of
17 customers does a company like Novelty have?

18 A Well, in this case we are talking about
19 furniture manufacturers.

20 Q In other words, for upholstery fabric you are
21 not selling to the retail level stores for people who want
22 to reupholster their own furniture or even to upholsterers?

23 A No, we sell to jobbers who might resell to
24 upholsterers, although that is a much smaller part of our
25 business.

gws

Feinberg - direct

14

1
2 The major part of our upholstery business is
3 with the furniture manufacturers.

4 Q Directly with them?

5 A Directly with them.

6 Q All right.

7 A Through our sales agents.

8 Q Please continue.

9 A After we came to the conclusion, one among many
10 other areas, that this would be a direction we would like
11 to pursue, Geraldine Scalone made sketches of the various
12 possibilities and the various different types of Argyle
13 plaids which could be interesting.

14 After looking at, you know, sketches and having
15 discussions back and forth, we decided on a sketch which
16 was similar to what is now Pattern 253 and Pattern 256.

17 At that point we asked Geraldine to make what
18 we call mock-ups. In that case you take paper and put
19 a two-sided masking tape so it sticks to the paper and it's
20 also sticking on the top. She lays down yarn on them
21 in the correct gauge, as the machine approximately would
22 put it, and made several variations, different colors,
23 different variations of what she had, presented them to
24 Ira and myself for discussion. Then we work on thesedse
25 things and we make a great many changes.

Feinberg - direct

15

The purpose of that, you can make a lot of changes right on the spot. You can pull the yarn off and pull the yarn down. You can make the change very, very quickly. This is stuck to paper.

We finally arrived at a mock-up. This is set quickly, but this is over a period of weeks.

We arrived at a mock-up which was the fore-runner of Style 256 and 253.

Q You mentioned Stule 256 and Style 253.

Can you tell us what the differences are between those two styles?

A Yes. 253 is 100 percent olefin.

256, the ground uses instead of an olefin yarn uses a cotton and rayon yarn, which is also a slub yarn which gives a somewhat different appearance and is a somewhat different color than the similar color of the olefin yarn used in Pattern 253.

Q After you completed the mock-ups, I assume the three of you decided that that was something you wanted to consider for manufacture; is that correct?

A That's correct.

MR. GIBSON: Objection to leading the witness,
your Honor.

THE COURT: I am not going to worry about that

1 gws Feinberg - direct 16

2 at this point. I will give you the same opportunity.

3 MR. GIBSON: Thank you, your Honor.

4 THE COURT: The witness could probably lead
5 Mr. Silberman much better.

6 MR. SILBERMAN: I'm sure he could, your Honor.

7 A (Continuing) After that we drew up the
8 technical requirements that it would need and gave it to
9 the mechanics to set up on a machine to make a sample.

10 We made the warps, made the sample, entered
11 the yarn into the machine, ran down the sample for evalu-
12 ation purposes.

13 Q How many samples would you say were made of
14 Style 253 or 256?

15 A Well, you mean before we made a finalization?

16 Q Correct.

17 A I would say eight or ten.

18 Q Were they of different designs?

19 A No, they weren't different designs. They
20 were just variations of the theme.

21 The design we had already focused on and com-
22 mitted ourselves to. It was to try to get the best
23 general overall appearance of the design that we kept
24 on making changes and also from a technical, practical
25 viewpoint, and to some degree from a cost viewpoint,

1 gws Feinberg- direct 17
2 although to a smaller degree. We make the fabric that
3 we think looks best and price it accordingly. Sometimes
4 if we feel there's too much there, we can do things to bring
5 the cost down.

6 Q You testified that Novelty places copyright
7 notices on all of its new designs.

8 I would like to hand you a sample of fabric
9 and ask you if you can identify it?

10 A This is our Style No. 253 Cane.

11 MR. SILBERMAN: I ask that one yard of Style
12 253 be marked as Plaintiff's Exhibit 1.

13 (Plaintiff's Exhibit 1 was marked for
14 identification.)

xx 15 THE COURT: Is there any problem about that?

16 MR. GIBSON: No, your Honor.

17 THE COURT: Received.

18 (Plaintiff's Exhibit 1 for identification
19 was received in evidence.)

xx 20 Q Mr. Feinberg, will you identify the copyright
21 notice on Plaintiff's Exhibit 1?

22 A As you see along the selvage, it's marked
23 "Copyright Novelty Textile Mills, Incorporated.

24 Q In fact, doesn't it say "Inc."?

25 A "Inc."

gws

Feinberg - direct

19

1 Q Mr. Feinberg, I hand you a square of fabric
2
3 in one color combination with a series of six smaller
4 fabrics in another combination attached thereto and ask
5 if you can identify that?

6 A Yes. This is a square and color line of
7 Novelty Textile Mills of Style No. 253.

8 MR. SILBERMAN: I ask that it be marked as
9 Plaintiff's Exhibit 2.

10 THE COURT: DO you have any objection, Mr.
11 Gibson?

12 MR. GIBSON: No objection, your Honor.

13 THE COURT: Received.

14 (Plaintiff's Exhibit 2 was received in
15 evidence.)

xx 16 Q Mr. Feinberg, can you tell us what the small
17 pieces of fabric are that are at the bottom?

18 A Well, those are color ways. The larger piece
19 is called the master and the smaller pieces are called the
20 color ways. These are the various colors that the
21 fabric is available in.

22 Normally we select what we think is the best
23 color way to make the master. In this case we selected
24 Cane.

25 Q Is there a copyright notice on Plaintiff's

1 gws

Feinberg - direct

2 Exhibit 2?

3 A Yes. On our tag is printed the notice
4 "Fabric Copyright, Novelty Textile Mills, Inc."

5 Q How is that tag attached?

6 A The tag is attached, being sewn onto the fabric
7 with a sewing machine and nylon thread.

8 Q How are the color way samples attached to the
9 large square?

10 A They are also sewn, same sewing machine and
11 same nylon thread.

2 12 Q Mr. Feinberg, I hand you a large piece of
13 fabric approximately 18 inches by 36 inches, which appears
14 to be adhered to a piece of cardboard, and ask if you can
15 identify that?

16 A This is Novelty Textile Mills Style No. 253,
17 color Cane.

18 MR. SILBERMAN: I ask that this exhibit be
19 marked as Exhibit 3.

20 (Plaintiffs Exhibit 3 was marked for
21 identification.)

xx 22 MR. GIBSON: No objection, your Honor.

23 THE COURT: All right. It may be received.

24 (Plaintiff's Exhibit 3 for identification was
xx 25 received in evidence.)

1 gws Feinberg - direct 21

2 Q How did Exhibit 3 come about, Mr. Feinberg?

3 A Well, we mounted the fabric this way for the

4 purpose of demonstrating certain things to the Court when

5 it would become necessary.

6 Q Is this a piece of fabric adhered to a piece

7 of cardboard?

8 A Yes.

9 Q Is this a piece of fabric taken from the

10 standard production run of Novelty?

11 A Yes, it is.

12 Q This exhibit was prepared for the purposes of

13 this trial?

14 A Yes.

15 Q Did there come a time, Mr. Feinberg, when you

16 believed that the defendant in this case, Joan Fabrics

17 Corporation, had copied your Style 253?

18 A Yes.

19 Q Did you at some point in time, Mr. Feinberg,

20 receive a sample of a fabric of Joan Fabrics Corporation

21 that you believed to be an infringement of Style 253?

22 A Yes, I did.

23 Q I hand you, Mr. Feinberg, a sample which carries

24 a header, printed header that says "Joan Fabrics Corpora-

25 tion" and the words "Pattern and color" and written in

1 gws

Feinberg - direct

2 ink after Pattern are "CK 0028" and after Color is the
3 name "Slate", and ask if you can identify that?

4 A Yes. This is a square and color line which
5 was delivered to me by our sales agents in North Carolina
6 during the spring market -- excuse me -- the fall market in
7 October 1976.

8 MR. SILBERMAN: I ask that this sample be
9 marked as Plaintiff's Exhibit 4.

10 (Plaintiff's Exhibit 4 was marked for
11 identification.)

xx 12 MR. GIBSON: No objection.

13 THE COURT: It may be received.

14 (Plaintiff's Exhibit 4 for identification
15 was received in evidence.)

xx 16 Q You say you received this in the October
17 market.

18 Can you tell us when that market was?

19 A Well, I think the market is I think from October
20 14 to October 22. I might be a little off in my days,
21 but not too much.

22 Q Where is the market located?

23 A It's in North Carolina, in High Point, Hickory
24 and various furniture towns in that area.

25 Q When did you visit that market?

1 gws

Feinberg - direct

2 A I visited it from the 19th through the 21st.

3 Q Why did you obtain a sample of Plaintiff's

4 Exhibit 4?

5 A While going around to the various showrooms
6 at the market, I found in many places furniture with fabrics
7 made of patterns like our Pattern 253 and 256 which were
8 not made by Novelty Textile Mills and which I believed
9 infringed upon the copyright of Novelty Textile Mills, and
10 so I asked my sales representatives to try to secure some
11 fabric for me, and this is the fabric that they gave me
12 at the market, which was not the only fabric that I had
13 seen at the market which I thought infringed.

14 Q Mr. Feinberg, I hand you another piece of
15 fabric which has stapled thereon a printed header that
16 reads "Joan Fabrics Corporation, Pattern and Color," and
17 what appears to be printed in ink are the words after
18 Pattern "Fleetwood" and after Color "Spice" and ask if you
19 can identify that sample?

20 A Yes. I received this sample --

21 Q Can you identify it?

22 A Yes. I can identify it by the label as Joan
23 pattern Fleetwood, color, Spice.

24 MR. SILBERMAN: I ask that this be marked as
25 Plaintiff's Exhibit 5.

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Feinberg - direct

(Plaintiff's Exhibit 5 was marked for identification.)

MR. GIBSON: No objection.

THE COURT: Received.

(Plaintiff's Exhibit 5 for identification was received in evidence.)

Q Mr. Feinberg, can you tell us how you came to receive Plaintiff's Exhibit 5?

A Well, while I was down at the market and our sales representatives had secured the CK 0028, we had seen another fabric which was even probably closer to our 253 and 256, and I had asked our agents to try and get the sample of that for me.

About three weeks after the market they sent the sample up to me.

Q Approximately when you did you receive this sample, Plaintiff's Exhibit 5?

A I would say maybe the second or third week -- about the third week probably in November, second or third week.

Q Mr. Feinberg, I hand you yet another piece of fabric, which has no markings on it, and ask if you can identify that?

A Yes, I can. This is a fabric which is also

gws

Feinberg - direct

25

CK 28, which was manufactured by Joan Fabrics. I guess it is CK 0028.

MR. SILBERMAN: I ask that it be marked as Plaintiff's Exhibit 6.

(Plaintiff's Exhibit 6 was marked for identification.)

MR. GIBSON: No objection.

THE COURT: Received.

(Plaintiff's Exhibit 6 for identification was received in evidence.)

Q When did you receive Plaintiff's Exhibit 6, Mr. Feinberg?

A Yesterday.

Q Have you examined the pattern or the design on Plaintiff's Exhibit 6 and compared it with Plaintiff's Exhibit 4?

A Yes, I have.

Q Are the designs the same?

A Yes, they are.

Q What are the differences?

A Color.

Q I believe you testified earlier this afternoon, Mr. Feinberg, that Novelty Stule 253, that is Exhibit 1, was first introduced in January 1976; is that correct?

1 QWS

Feinberg - direct

26

2 A That's correct.

3 Q What do you mean by introduced?

4 A Well, the first week in January or as soon
5 thereafter as possible we sent our sample line for the
6 spring market out to the various salesmen to whom it is
7 relevant. In our case it would be the salesmen that
8 cover North Carolina and the southeast in general, salesmen
9 that cover the northeast and salesmen that cover the Mid-
10 west. They get it first.

11 Then it's sent out to the salesmen that cover
12 the southwest and the salesmen that cover the far west.
13 In most cases their customers do not exhibit at High
14 Point, in most cases. So they get it a little later.

15 Q These salesmen are salesmen of Novelty?

16 A They are agents, they are not employees.
17 They are sales agents there, not employees of Novelty.

18 Q They operate on commission?

19 A Right.

20 Q What do those salesmen do with the samples?

21 A They take the samples, they set up appointments
22 and they either go to see the customers or the customers
23 come to see them in their offices, either case, and they
24 show them the various samples we are offering for sale.

25 Q When was that done with respect to Plaintiff's

1 gws

Feinberg - direct

27

2 Exhibit 1?

3 A Well, that was done the beginning of January
4 1976.

5 Q Would that have been true with respect to the
6 entire color line that is represented by Plaintiff's
7 Exhibit 2?

8 A Yes, the entire group of colors were shown all
9 at the same time.

10 Q Are those samples left with the customers by
11 the salesmen?

12 A No, they are not.

13 Q At this point we are really talking about
14 potential customers?

15 A Potential customers.

16 Q You mentioned High Point and shows.

17 Are these shows of upholstery fabrics or are
18 they shows of furniture?

19 A Those shows are shows where the furniture
20 manufacturers exhibit their furniture for retail buyers to
21 look at and purchase, for the fabric manufacturers to
22 exhibit their fabric.

23 Q Do furniture --

24 THE COURT: Mr. Silberman, can I understand
25 something for the moment? I think he may have mis-

spoken.

What you mean are for retailers of furniture
to buy?

THE WITNESS: Retail stores, right, to buy the furniture.

THE COURT: You said for retail. I could walk in and buy something?

THE WITNESS: I understand.

THE COURT: All right.

THE WITNESS: I'm incorrect.

THE COURT: All right.

THE WITNESS: Thank you.

THE COURT: In other words, it's for retail outlets?

THE WITNESS: Yes.

THE COURT: They are making an exhibition for retail outlets?

THE WITNESS: For stores, right.

THE COURT: All right.

BY MR. SILBERMAN:

Q When do the upholstery manufacturers determine what fabrics are going to be in their line?

A Well, there's a great deal of variation and timing between the various manufacturers, but the norm

gws Feinberg - direct 29

would be they start looking the beginning of January and
they order square and color lines. That's like that --

Q Like Plaintiff's Exhibit 2?

A Yes. They order the patterns that they like. They order square and color lines of it. The square and color lines are sent to the manufacturers and some time between February and March they make their selections, their determination as to what fabrics they -- what new fabrics they want to utilize and they order anywheres from 20 yards to 20 pieces, according to the manufacturer's methods of operation and the size of the manufacturer.

Q These orders that the manufacturers place,
for what purpose are they?

A Those are for the purpose of having fabric to make samples of furniture to exhibit at the market and also, if they buy more, it's for some potential back up fabrics.

Q You mentioned in the spring of the year.

For what trade show for the retailers does that take place?

A The High Point market, which is the national market, takes place during April of each year.

Q Is there another market in the fall?

A There's a market in the fall which takes place

1 gws

Feinberg - direct

31

2 THE WITNESS: I would estimate it was more
3 than 25.

4 THE COURT: All right.

5 THE WITNESS: Of course, I don't see all the
6 manufacturers.

7 Q Can you name some of the upholstery manu-
8 facturers who were showing Style 253 at the spring show
9 in High Point, spring 1976?

10 A Schnadig, Kroehler, Brookwood, Futurian.

11 Is that enough?

12 Q That will suffice.

13 Do you recall with respect to each of those
14 upholstery manufacturers in what color combination they
15 were showing Style 253?

16 A In each case they were showing Cane, in some
17 cases they showed a second color.

18 Q Cane, is that the one that we have marked as
19 Exhibit 3, which is displayed on the blackboard here?

20 A Yes.

21 THE COURT: You keep saying upholstery manu-
22 facturers.

23 These are furniture manufacturers.

24 MR. SILBERMAN: They are manufacturers of
25 upholstered furniture.

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word.

THE COURT: Furniture I think is the better

Q Was 253 in Cane well received at the spring
show in High Point?

Q When did Novelty start receiving orders from furniture manufacturers for 253 Cane?

A We started to receive orders actually before the show started because there are pre-showings. We started to receive orders either the very end of March or the beginning of April and we continued to get orders during the show and after the show.

Q Can you tell us approximately the dollar volume of business that Novelty has done in 253, all colors, since it first introduced that design?

A I would say approximately half a million dollars.

Q Approximately what percentage of that half a million dollars in sales has been done in a color combination identified as Cane?

A Minimum of 75 percent.

gws

Feinberg - direct

33

1 Q According to my poor math, that is approx-
2
3 imately \$375,000.

4 A I will accept your figure.

5 MR. GIBSON: Is that a question or a statement,
6 your Honor?

7 THE COURT: That is a statement. Mr. Silberman
8 is testifying for us.

9 THE WITNESS: He doesn't trust my arithmetic.

10 THE COURT: I think he doesn't trust mine.
11 That is the answer.

12 Q Can you tell us what would approximately 75
13 percent of half a million dollars be?

14 A 375,000.

15 Q Thank you.

16 THE COURT: Can we have a time frame on this?

17 THE WITNESS: From the time it was introduced.

18 THE COURT: To date?

19 THE WITNESS: To date, approximately.

20 THE COURT: All right.

21 THE WITNESS: Yes.

22 THE COURT: So that would be from 1976, let's
23 say, until today?

24 THE WITNESS: Yes.

25 THE COURT: Is that right?

1 gws Feinberg - direct

2 THE WITNESS: Yes.

3 THE COURT: All right.

4 Q During what period of time would you say
5 Style 253 Cane generated the most orders?

6 A Generated the most business between approx-
7 imately April of 1976, some time in April, through the end
8 of June. That's as far as incoming orders are concerned.

9 Q Can you tell us the amount of orders that were
10 received on a periodic basis, say a weekly basis, for
11 Style 253 Cane?

12 A Well, actually I don't have all those numbers
13 in my head. As you know, I didn't know that I was going
14 to come here to testify today. So I couldn't give you
15 a week rundown.

16 I know that the strongest period was between
17 April and June. It continued strong from June through
18 October and during the October market, and thereafter it
19 dropped off very, very dramatically to a much greater
20 degree than anything else in our line, although it had been
21 our best selling number.

22 Q When you say it was your best selling number,
23 is that with respect to any other upholstery fabric in
24 your line?

25 A Yes, during that relative period of time.

1 gws

Feinberg - direct

2 Q You are referring to Style 253 Cane?

3 A I'm referring to 253, all colors, and 256,
4 all colors lumped together. If you say 253 Cane was a
5 better seller than any other individual color of any
6 other individual number, that's also true.

7 Q Did there come a period in time when you
8 noticed a decline in orders?

9 A In October.

10 Q In October of this year?

11 A October of 1976.

12 Q What happened at that time.

13 A Business just stopped coming in.

14 Q Did you receive any cancelations?

15 A We received a cancelation -- we received and
16 are receiving cancelations on 253 Cane.

17 Q Did Schnadig place orders for commercial
18 quantities of 253 Cane?

19 A Yes.

20 Q When I say "commercial quantities," I mean in
21 excess of that required for samples.

22 A Yes.

23 Q Did Kroehler place orders for 253 Cane in
24 commercial quantities?

25 A Yes.

gws

Feinberg - direct

1 Q Did Futurian place orders for 253 Cane in
2 commercial quantities?
3

4 A 256 Cane.

5 Q 256.

6 A Yes.

7 Q Did there come a time when all four of those
8 companies previously named discontinued ordering Style 253
9 or Style 256 Cane?

10 A All of them have.

11 Q Approximately when was that?

12 A Probably between September and now. From
13 September of '76 on they had all stopped placing orders.

14 Q Are any of those four companies ordering 253
15 or 256 Cane from Novelty at this time?

16 A No.

17 Q Are any of those four companies ordering 253
18 or 256 at this time in any other color way?

19 A Yes.

20 Q What color way is that with respect to each
21 of the manufacturers; can you tell us?

22 A If you will give me the --

23 Q This is Exhibit 2, which is the square and
24 color line of 253.

25 A Schnadig is still ordering 253 Mocha and

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Feinberg - direct

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Kroehler is still ordering 253 Camel.

Q Any others?

A No.

Q You testified, did you not, Mr. Feinberg, that you visited the High Point market during the period of around October 20th of this year; is that correct?

A Last year, 1976.

Q Last year?

A Yes, sir.

Q Did you visit the Schnadig showroom at High Point in October 1976?

A Yes.

Q Were they displaying 253 Cane?

A I'm not certain at this point in time if they were or not.

Q Were they displaying any of the Joan Fabrics that have been marked as Plaintiff's Exhibits 4, 5 or 6?

A Excuse me. I misunderstood you. They were not showing 253 Cane, definitely. What I'm not sure of is whether they were showing one of the Joan exhibits.

Q Did you visit the Kroehler showroom?

A Yes, I did.

Q Were they showing Novelty 253?

1 gws Feinberg - direct

2 A No, they were not.

3 Q Were they showing any of the Joan styles
4 marked as Exhibits 4, 5 or 6?

5 A Yes, they were.

6 Q Which ones were they showing?

7 A I can't be sure because I had seen an awful lot
8 of variations, but I believe they were showing 5.

9 Q 5?

10 A Yes.

11 Q That is the one that is marked Fleetwood Spice?

12 A Yes, that's my belief. I don't have it in
13 hand to compare.

14 Q Is there any doubt in your mind that they were
15 showing one of those Joan designs?

16 A No question. They said that it was Joan's
17 fabric.

18 Q Who is "they"?

19 A Terry Henderson.

20 Q What position does he hold?

21 A Executive vice-president.

22 Q Did you visit the Brookwood showroom in High
23 Point during October 1976?

24 A Yes, I did.

25 Q Were they showing Novelty 253?

gws

Feinberg - direct

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A No, they were not.

Q Were they showing any of Joan's as exemplified by Exhibits 4, 5 or 6?

A Yes, they were.

Q Can you identify which one they were showing?

A They were showing either 5 or 6.

Q How did you know that was Joan?

A They had sample fabrics in their racks with Joan's headers on them and with Joan's markings on the fabric itself.

Q Did you visit the Futurian show room at High Point, in the High Point area during October 1976?

A Yes, I did.

Q Were they showing Novelty Style 256?

A No, they were not.

Q Were they showing any of Joan styles as exemplified by Exhibits 4, 5 or 6?

A Yes, they were.

Q Can you tell us which one they were showing?

A They were showing either 5 or 6. In all cases they were showing the combination, which is the version of 253 Cane or 256 Cane. It's that color combination always. I never saw another color combination at the market.

1 gws Feinberg - direct

2 Q Of anyone's fabric or are you talking about
3 Joan's?

4 A Joan's. The only color I saw of Joan's
5 was that color combination in furniture.

6 Q Mr. Feinberg, in your affidavit in support
7 of this motion for a preliminary injunction sworn to on
8 December 23, 1976, you stated that:

9 "Orders for Style 253 during the period
10 July through September averaged approximately
11 4800 yards per week."

12 I ask you where you got that information from?

13 A We got that information from the records of
14 our company. We enter on the log all the orders as they
15 come in by style and color and yardage.

16 Q That period July through September, was that
17 1976?

18 A Yes.

19 Q You also state in your affidavit that:

20 "Since commencement of the infringement by
21 defendant the orders have declined to an average
22 of about 2800 yards per week."

23 Where did you get that information from?

24 A From the same records, the records of our
25 company that we log weekly.

1 gws

Feinberg - direct

42

2 MR. GIBSON: I object to what he has heard
3 and move to strike, your Honor.

4 THE COURT: Sustained. It may be struck.

5 Q Have you ever seen a list of Joan covering
6 their Styles CK 0028 or Fleetwood as exemplified by
7 Exhibits 4, 5 or 6?

8 A No. I only seen it on the headers that we
9 had available to see.

10 Q Can you explain to us how Novelty Style 253
11 is knitted in reasonably non-technical terms?

12 A I can try.

13 Can I go to the board?

14 Q Why don't I give you a sample. This is
15 Plaintiff's Exhibit 1, unless you prefer to go to the
16 board and point it out.

17 THE COURT: I think it might be easier if he
18 went to the board.

19 (Pause.)

20 A The various elements in the fabric, one element
21 you can see better from the back --

22 MR. GIBSON: I object to the witness demonstrat-
23 ing on Exhibit 6 how his fabric is knitted.

24 THE COURT: Throw it over the top of the board
25 and let it hang down.

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Feinberg - direct

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Q You are referring to 1?

A Which is Exhibit 1?

THE COURT: That is Exhibit 1.

A (Continuing) Okay, I'm referring to Exhibit 1. You can see it more easily, this element, on the back of the fabric. Down the length of the fabric is a chain stitch. That would be designated as 2002. That would be the technical terminology. This is the links that he used to make that stitch. That is the only knitting element in the entire fabric. There's only one bar that knits traditionally in a Raschel-crochet machine, such as the Cidega machine type.

Also in the back we have yarn going back and forth over a given number of needles, either three or four, which ties the chain stitching together and thereby makes it a viable fabric. Just between those two bars you now have a viable fabric. It doesn't look very good, but it's a held-together knitted fabric.

Now we come to what we normally call a design bar, although they are all the same. We call this a design bar. This function in the back doesn't serve a design function in this particular case. You have the yarn going one needle at a stop, stopping in between each needle, in this case for a distance of 21 needles, and

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Feinberg -- direct

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1 then going back 21 needles one at a time, which gives the
2 appearance of this chevron.
3

4 We have another design bar in front of this
5 which, therefore, would lay on top of the yarn on the
6 previous design bar doing the exact same thing in the
7 opposite direction, thereby giving this appearance.

8 In this particular case, in the designing of
9 this fabric, we chose to use the background bar that is
10 going over, also introduce design element colors. So
11 one-half of the diamond formed in the Argyles are made on
12 a ground bar. It could be made another way, but that's
13 the way we chose to do it when we made it.

14 Then after skipping a certain number of spaces
15 we introduced the other yarn going the opposite direction,
16 thereby forming in this one the diamond and in this one
17 the Argyle, forming the under and over appearance that you
18 get.

19 Here the dark is over the white and on here
20 the white is over the dark. So it gives you and under
21 and over appearance. You can get Argyles on this
22 machine many other ways, where you don't have to get the
23 over and under appearance. This is the way that we
24 chose to design it because we felt that gave it a very
25 good appearance.

1 gws

Feinberg - direct

2 Q Just so we understand, Mr. Feinberg, we
3 see a series of distinctive stripes, in effect, going
4 diagonally in one direction and diagonally in the other
5 direction.

6 Do I understand your testimony that these are
7 not just knitted in a continuous length but they are
8 knitted by bars that go in a zigzagging pattern?

9 A You are right. I probably don't think to
10 make things clear enough because they seem obvious to me.
11 One bar is making a chevron essentially going, let's say,
12 from right to left and the other bar is making a chevron
13 in the opposite direction going from left to right and
14 they meet and they form a diamond. These things are
15 doing the same thing. It's all according to the place-
16 ments.

17 Based upon the placements of the yarn with
18 this same design, I would venture to say that there are
19 thousands of variable designs that you could get from the
20 same stitches that are in this fabric.

21 Q Have you compared the stitches in Style 253
22 with the stitches in Joan's fabric Exhibits 4, 5 and 6?

23 A Yes, I have.

24 Q Are the stitches the same?

25 A Well, there's a very minor difference in

1 gws

Feinberg - direct

2 the stich, where we are traveling over 21 needles, they
3 are traveling over 20 needles. In all other respects
4 it appears to be the same.

5 Q Is there anything in the machine that requires
6 squares, rectangles or diamonds of the particular shape
7 of the four exhibits on the blackboard that we see in
8 front of us?

9 A Not at all. The machinery is capable of
10 making an absolutely infinite variety of designs having
11 nothing to do with diamonds or chevrons or Argyles.

12 Q Mr. Feinberg, I believe you referred to some
13 of the yarn as being the ground; is that correct?

14 A Yes.

15 Q Will you explain what that means?

16 A Okay. I'll have to go back a little bit.
17 I want to only use my own fabric.

18 What happened to it?

19 Q I'm sorry.

20 A We have the chain stitch, which I spoke about,
21 we have what I call the backshot, which I spoke about,
22 and that would form the fabric. What I would call the
23 ground on this cloth would be the furthest back bar that
24 is making the chevron because if we took the other bar
25 off, we would still have a completed fabric making a

1 gws Feinberg - direct 47

2 chevron, and that becomes the ground of the fabric upon
3 which we use another bar to complete the design.

4 Q So there --

5 A We used the ground as part of the design in
6 this particular case for our designing purposes. It didn't
7 have to be done that way. This bar is the ground bar
8 and this bar is the design bar.

9 Q What color are the fibers in the ground of
10 this fabric, Plaintiff's Exhibit 1?

11 A It's a beige color.

12 Q Are there any colored fibers used in the ground
13 or made as part of the ground bar?

14 A Yes. As part of the ground bar are these
15 more brown colored fabrics, colored yarns, and these other
16 yarns, which are also beige, but a darker beige. Those
17 are also incorporated in the ground.

18 It's just by their placement in the machine
19 and in the tubes that they form this kind of a design.

20 Q Are there also overlay yarns?

21 A Right.

22 Q Which are those?

23 A The overlay yarns are the exact same yarns
24 as the colored yarns in the ground except the only thing
25 that is in the overlay are the colored yarns and they are

gws

Feinberg - direct

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in the knitted fabric, the top of the ground yarns.

Q Which colors? Can you identify them more clearly?

A Yes, the same colors as used in the ground color, as used in the design bar. This is the design bar and this is the ground. They are both the same color. This is the ground and this is the design and they are both the same color.

Q In other words, with respect to each of the darker color yarns, half of the diamond or rectangle is made by the design bar and half is made by the ground bar; is that correct?

A Yes.

Q Could it all be done by the ground bars, both halves of the square?

A No, it could not.

Q Could it all be done by the design bar?

A Yes, it could. You could use another design bar to use this and then you would have a different effect which could be more pleasing, but which would take more yarn.

Q Can you identify Joan's fabrics, Exhibits 4, 5 and 6, and tell us whether the darker color stripes are made all design bars or half by design bars and half by

1 gws

Feinberg - direct

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2 ground bars?

3 A Darker color stripes are made one-half by the
4 ground bar and one-half by the design bar in the same
5 manner that our 253 is made.

6 Q Am I correct --

7 A That's in all cases.

8 Q In all cases of Exhibits 4, 5 and 6?

9 A Yes.

10 Q Am I correct that you testified that that
11 was not necessary in the Cidega machine?

12 A There's other ways it could be achieved.

13 Q Is Exhibit 1, the Novelty Style 253, made on a
14 Cidega machine?

15 A Yes, it is.

16 Q Do you know whether or not the Joan fabrics
17 are made on Cidega machines?

18 A It's my belief that it is, but I can't testify.
19 I have never seen it.

20 Q All right.

21 That is exhibit that is on the blackboard,
22 which is a composite of Exhibits 3, 4, 5 and 6, can you
23 tell us how that came about?

24 A How we came to make it?

25 Q Yes. Did you make it?

gws

Feinberg - direct

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DIRECT EXAMINATION (Continued)

BY MR. SILBERMAN:

Q Mr. Feinberg, have you read the brief that the defendant Joan submitted in opposition to this proceeding?

A I read a lot of things. If you show it to me, I'll tell you if it's the one I read. I don't know what the brief is and what the other things are.

Yes, I did.

Q Do you recall reading a statement in that brief that:

"In considering the balance of hardship, it should be noted that it is entirely possible depending upon the scope of the injunction granted, if any, that defendant would not only face the removal of the fabrics in question from its line, but could also be restricted in the utilization of the inherent capabilities of the machines which it owns. Beyond that, defendant could be forced to sell the machines which it manufactures with limitations placed on how defendant's customers could use the machines"?

Mr. Feinberg, with your technical knowledge of the operations of the Cidega machines, would other

1 aws Feinberg - direct 52

2 owners of Cidega machines be prohibited from using their

3 machines if an injunction was granted preventing Joan

4 from marketing fabrics such as Styles 4, 5 and 6?

5 MR. GIBSON: Objection, your Honor. That
6 question is totally improper and calls for a legal con-
7 clusion as well as a supposition.

8 MR. SILBERMAN: Your Honor, I don't believe it
9 does. I believe that they have made a statement --

10 THE COURT: The assertion is made in the
11 memorandum that was submitted to the Court, and under 701
12 I deem this witness to be qualified to make that state-
13 ment.

14 MR. GIBSON: Very well, your Honor.

15 Q Do you remember the question?

16 A I think so. In no possible way could that
17 be true, not even remotely.

18 Q How many different designs could be produced
19 on a Cidega machine?

20	A	Infinite.
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21 THE COURT: Mr. Silberman, I will take his
22 word for it.

23 MR. SILBERMAN: I would just like to show
24 you a few, your Honor.

25 THE COURT: All right.

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Feinberg - direct

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MR. GIBSON: I object, these having been served on us and they weren't part of the motion.

The fact of the matter is, your Honor, the composite exhibit wasn't served on us and wasn't part of the motion either. Under the rules --

THE COURT: I don't know how it could be. I think visual aids are always acceptable. I think you have enough experts backing you up here so they can tell you about this in nothing flat.

I am going to take a short recess before I let you cross-examine. I am going to take a short recess, Mr. SILBERMAN.

(Recess.)

THE COURT: You are still under oath, Mr. Feinberg.

DIRECT EXAMINATION (Continued)

BY MR. SILBERMAN:

Q Mr. Feinberg, we have marked in evidence as Plaintiff's Exhibits 4, 5 and 6 fabrics of Joan identified by the style or patterns CK 0028 and Fleetwood.

Have you ever seen any other designs of Joan that you believe are similar to your 253?

A Well, I saw some at the show on furniture. Obviously I couldn't take them. I don't know if there

gws Feinberg - direct

are differences. I was told there were variations.
It was so stated in one of the documents that Joan
prepared.

I haven't, to my knowledge, had my hands on any
of the others, and I would very much like to.

Q Have you ever seen a Joan CK 0035?

A No, I have not.

Q Have you ever seen a Joan CK 0042?

A No, I have not.

Q Have you ever seen a Joan Electra?

A I have not.

Q Very briefly, Mr. Feinberg, I am going to hand
you four samples of fabric that have been marked as
Plaintiff's Exhibits 7, 8, 9 and 10 and ask if you can
identify those four?

A These are all fabrics that Novelty Textile
Mills made at one time or another over the past years.

MR. SILBERMAN: I ask that they be received
in evidence.

MR. GIBSON: I continue my other objection
which I understand the Court has overruled. Just for the
record, I will put it on there.

THE COURT: All right. Fine.

They are received.

1 gws

Feinberg - direct

2 (Plaintiff's Exhibits 7 through 10 for
3 identification were received in evidence.)

4 THE COURT: Are those made on the Cidega
5 machine?

6 THE WITNESS: Yes, they are.

7 MR. SILBERMAN: I was about to ask that, your
8 Honor.

9 THE COURT: All right.

10 Q Mr. Feinberg, I am holding up Exhibit 7, and
11 I ask you whether that was made on a Cidega machine?

12 A Yes.

13 Q On the same Cidega machine that produced
14 Novelty Style 253?

15 A Yes.

16 Q I am holding up Exhibit 8, and I ask you whether
17 that was made on a Cidega machine?

18 A Yes.

19 Q On the same Cidega machine that makes 253?

20 A Yes.

21 Q I am holding up Exhibit 9, which is a series
22 of five different color ways of what appears to be a
23 single design, and I ask whether those were made on
24 Cidega machines?

25 A Yes.

1 gws Feinberg - direct 56

2 Q The same Cidega machine that produced Novelty

3 Style 253?

4 A Yes. You say the same machine. You mean

5 the same type of machine?

6 Q The same type of machine?

7 A Yes.

8 Q What is the difference?

9 A It's not the same specific machine. We have

10 a lot of machines.

11 Q I am holding up Exhibit 10, and I ask whether

12 that was made on a Cidega machine?

13 A Yes, it was.

14 Q Was that the same type of Cidega machine that

15 made 253?

16 A Yes.

17 THE COURT: What you are telling us is that

18 the machine that made those, if it was altered as to the

19 number of needles, et cetera, it could make the same

20 design as 253 or 256?

21 THE WITNESS: Yes. In other words, they

22 are not limited to that type of design. That's only a

23 small sample of what they could make.

24 THE COURT: All right.

25 Q Approximately how many other designs could a

gws

Feinberg - direct

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1 Cidega machine make?

2 A As I said, its infinite.

3 MR. SILBERMAN: Your Honor, I also --

4 THE COURT: Ask Mr. Gibson if there's any
5 problem about that.

6 MR. SILBERMAN: Any problem with me putting
7 in the certificate of registration?

8 MR. GIBSON: No objection.

9 THE COURT: Let's substitute the photostat
10 that's been included in the papers for that.

11 MR. GIBSON: So stipulated, your Honor.

12 MR. SILBERMAN: Shall we mark that as an
13 exhibit, your Honor?

14 THE COURT: Mark the photostat as an exhibit.

15 MR. SILBERMAN: All right, your Honor.

16 THE COURT: I have a copy in the papers.
17 That's Plaintiff's Exhibit 11 in evidence. That is the
18 certificate of registration.

19 (Plaintiff's Exhibit 11 was received in
20 evidence.)

21 MR. SILBERMAN: Your Honor, I have no further
22 questions of this witness.

23 THE COURT: All right.

24 Mr. Gibson.

gws

Feinberg - cross

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CROSS EXAMINATION

BY MR. GIBSON:

Q Mr. Feinberg, in your direct testimony you stated that no other company had made warp-knitted upholstery fabrics in commercial quantities until 1973; is that correct?

A No, that's not correct, sir.

Q Would you enlighten me as to what you did say about that?

A I said that no company had made Raschel-crochet warp-knit fabrics until -- successfully commercially until 1973.

Q Do you know a company by the name of B & J Knitting Mills, Inc.?

A Yes, I do.

Q Are they still in existence?

A I believe so, but I don't know.

Q Isn't it true, that Mr. Feinberg, that prior to 1973 B & J Knitting Mills, Inc. was making Raschel warp-knit upholstery fabric in commercial quantities, buying yarns from a company in which you had an interest and that they had to discontinue that fabric because the yarn company quit selling them yarns?

A Entirely incorrect on all counts.

gws

Feinberg - cross

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Q They did not make Raschel warp-knitted upholstery fabric?

A I said successfully. Didn't I say that? Look at the record.

Q What do you consider successfully, sir?

A Successfully, I consider that they made the fabric, that they sold it, that they shipped it, it was acceptable to the trade from which it was intended and they continued to make it without trouble.

Now, what happened in this case, as I understand it, and which I know for a fact, they made it, it was accepted, it was bought, but it was unsatisfactory, it did not perform, they stopped manufacturing it and nobody would buy it. I don't consider that successful.

Q In point of fact, Kroehler Manufacturing Company did order quantities in commercial lots from B & J; did they not, sir?

A They did.

Q Do you know whether or not Kroehler paid for that fabric?

A I have no way of knowing if they paid for the fabric. I do know that they returned fabric. I do know that they had problems with the fabric. I do know that they discontinued with the fabric. What they do

gws

Feinberg - cross

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A It was not. B & J never bought yarn from a company that I owned.

Q Sir, you testified, I believe, that your Style 253 was designed with a mock-up laying on yarns.

I hand you Plaintiff's Exhibit 2 and I would particularly call your attention to the color way that is identified by the tag Mocha.

A Yes.

Q How would you characterize the yarns that make up the background or the space within the diamond?

A I'm not sure I know which yarn you mean.

Q The beige yarn in that fabric.

A Would you point to the one yarn you are referring to because there are three yarns visible.

Q The beige yarn that is within the space.

A Is it this yarn?

Q Yes, this yarn, the second yarn from the left or from your right.

A That's our 202. That's our Style 202 yarn, 100 percent olefin, slub yarn.

Q Let's look at the second yarn from your left in that same square, which is the first full square from the bottom.

What is that yarn?

gws

Feinberg - cross

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A Same yarn.

Q There are 11 beige yarns in that square.

Are they all of the same yarn?

A Yes, they are.

Q That is a slub yarn?

A Yes, it is.

THE COURT: What is a slub yarn?

THE WITNESS: It's a yarn that varies in thickness.

THE COURT: In thickness?

THE WITNESS: Yes.

THE COURT: All right.

Q The yarns that are used to make the diamonds or the outline of the diamonds, let's look first at the narrow bands.

Would you tell me what type of yarn is used in that band, narrow one?

A There's two yarns twisted together, one of which is a yarn that is over-fed on a core. The other one is just a plain spun yarn.

Q So it's two yarns plied together?

A Yes.

Q And knitted as one?

A Yes.

1 gws

Feinberg - cross

2 Q How many of those plied yarns are in that
3 band?

4 A Three.

5 Q In the over or designed bar band?

6 A Yes.

7 Q The narrow one?

8 A Yes, three.

9 Q All right.

10 Let's look at the wide bands, and will you tell
11 me what type is used in that band?

12 A The same definition.

13 Q Just a different color?

14 A Different color.

15 Q But essentially the same?

16 A Yes, the same definition as the other, over-
17 fed yarn on a core plied together with a spunoff.

18 Q Mr. Feinberg, when I look at this fabric, which
19 is Plaintiff's Exhibit 2, the color way of Mocha, in the
20 space within the diamond you see some brown showing between
21 the beige yarns; is that correct?

22 A I can't say that's correct. I don't see
23 brown.

24 Q What would you characterize the color between
25 the first and second?

1 gws

2 A Camel.

3 Q Camel color?

4 A Yes.

5 Q What is that color there? What is it that
6 you see between --

7 A That is the yarn put in by what I defined as
8 the backshot when I was describing how the fabric was
9 made.

10 Q Is that also called the ground?

11 A I call it a backshot. I call this the
12 ground.

13 THE COURT: You are not talking to him.
14 I have to hear what you say, too.

15 THE WITNESS: I call it the backshot.

16 THE COURT: Backshot?

17 THE WITNESS: Yes.

18 THE COURT: All right.

19 Q All right, sir.

20 Is it not true, Mr. Feinberg, that when you look
21 at your fabric you get a particular sculptured effect or
22 design from the use of these yarns?

23 A I really can't accept your terminology.

24 Q How would you characterize the fact that at
25 particular points you see the backshot and then you see

1 gws Feinberg - cross 65
2 another level of relatively narrow yarns and thicker
3 yarns and then still thicker and still thicker?

4 A You are looking at it as a lawyer and you are
5 seeing things completely differently than I see them.
6 I am looking at it as a fabric manufacturer and a designer.
7 I don't see that.

8 Q All right, sir.

9 Let's take this one square that we have been
10 looking at or diamond. At this point between those two
11 yarns there is a space that is approximately an eighth of
12 an inch.

13 A All right, yes.

14 Q In that space the only thing you see is the
15 backshot?

16 A Yes, backshot and the rubber, too.

17 Q And the rubber. The rubber does show
18 through?

19 A Yes.

20 Q All right, sir.

21 Then for at least the first two yarns here you
22 have a very fine or a very gauge yarn at that point in the
23 slub, yarn that is used in the knitting; is that not
24 correct?

25	A	Finely sized yarn.
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gws

Feinberg - cross

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2 Q Yes. Then for the next two it is an inter-
3 mediate size compared to the first two and the five yarns;
4 is that not correct?

5 A Yes, but we are only referring to this
6 particular square.

7 Q I understand that. We are only referring
8 to that one.

9 Then you have several of the yarns that are
10 relatively large compared to the first two; is that not
11 correct?

12 A That's correct.

13 Q And then the last one is back to an inter-
14 mediate size, is that not correct?

15 A Right.

16 Q Then the yarns that form the narrow bands are
17 still larger, are they not, than the largest part of the
18 slub because you have two plied yarns together?

19 A They are not larger because they are two plied
20 yarns. They are larger because they are larger.

21 Q They are larger, is that not correct, sir?

22 A All right, sir.

23 With the one narrow band that is part of the
24 ground bar and the one wide band that is part of the
25 ground bar, you have still a third or a fourth level from

1 gws

Feinberg - cross

2 your backshot because of the larger yarns laid on the
3 surface?

4 A I don't know what you mean by fourth level from
5 my backshot.

6 Q We have the backshot itself, we have the narrow
7 or fine gauge yarn, we have got the intermediate, we have
8 the large and a still third intermediate and we have
9 larger yarns forming this.

10 A These two yarns are the same.

11 Q I understand.

12 A These yarns are all the same. You want
13 to characterize them as small, intermediate and large,
14 okay.

15 Q Do they not show that way on that piece here?

16 A Yes.

17 Q Then you go to the design bar and because you
18 lay those on over the ground, they are still at another
19 height from the backshot; is that not correct?

20 A That's correct.

21 Q You, sir, would not characterize that as a
22 designer as a sculptured effect?

23 A No. I'm sorry, I don't characterize it that
24 way.

25 Q Let's look at this sample again.

1 gws

Feinberg - cross

2 Is it not true that in every square showing
3 on that sample you can see the backshot and the rubber
4 between the yarns? There's not a single square on there
5 where that is not true; is that not correct, sir?

6 A That is c orrect. That is correct of any
7 of them.

8 Q All right.

9 In all of your Style 253, all of your bands
10 that make up the square are put on in such a way that the
11 yarns lie contiguous and touching to each other to form a
12 solid band; is that not correct, sir?

13 A That is correct.

14 Q Is that true also of Style 256?

15 A Yes, it is.

16 Q Does your Style 256 always say that the backshot
17 showing between the ground yarns?

18 A Yes, it does.

19 Q Do you also use a slub yarn in the ground of
20 your Style 256?

21 A It's a different type, but it's a slub.

22 Q Mr. Feinberg, I never did hear your counsel
23 ask you:

24 When you filed an application for a copyright,
25 do you know whether or not you were required to file

gws

specimens of your fabric along with that application?

A Yes, we were because counsel asked for them.

Q Do you know what was filed? We haven't
seen any evidence of it.

Do you know what was filed?

A He asked me for a sample of 253, a yard.
We gave them a yard of 253 or two yards.

Q You really don't know what was filed in the Copyright Office as samples of the copyrighted work for this registration that has been entered into evidence; is that your testimony?

A I don't know what my attorney did, you are right.

Q I believe you also testified, Mr. Feinberg, about the over and under effect that was achieved by making one-half of the lines that make up the diamond in the ground bar and one-half in the design bar; is that not correct, sir?

A Yes, it is.

Q You said that was not necessary on the Cidega machine?

A What I said was it was not necessary to use the ground bar to make half of the design. They could have used an additional design bar to make that half of

Q Does the size of the yarns that are used have any limiting effect upon how many design bars you can use?

Q So when you said there was infinite numbers
sign variations, that was not correct?

Q If the yar size places the limitation on the
r of design bars that you use, then it cannot be
ite?

0 Without end.

A I say without end. There's limitless
rs of designs you can make.

Q The size of the yarn does place a limit on it?

MR. SILBERMAN: Objection. I think the witness has answered.

A This is semantics.

THE COURT: Asked and answered.

Q I believe you also testified, did you not, Mr. Feinberg, that you were in the apparel business or apparel fabric business; is that not correct?

A That is correct.

1 gws

Feinberg - cross

2 Q Is it not true that all of Plaintiff's Exhibits
3 7 through 10 are apparel fabric and not upholstery?

4 A That is very true.

5 Q They are made of much finer yarns than
6 upholstery fabric is normally made of; is that not
7 correct?

8 A That is not true. There is a fabric there
9 where the yarns are 1700 yards to the pound, which Mr.
10 Ansin can advise you of. Many upholstery fabrics have
11 yarns much finer than 1700 yards to the pound.

12 Q This one?

13 A No.

14 Q This one?

15 A Yes.

16 Q This is Plaintiff's Exhibit 9.

17 Have you ever made an apparel fabric on a
18 crochet warp-knitting machine like the Cidega, an Argyle
19 or a bias plaid?

20 A Sure.

21 Q How long ago was that, Mr. Feinberg?

22 A I can't -- I made it many times. I couldn't
23 tell you which one I made when.

24 Q I show you a dress, Mr. Feinberg, and ask if
25 you can identify that fabric either specifically or

gws

Feinberg - cross

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generally as to type?

A It's made in a Raschel-crochet machine, almost assuredly by Novelty Textile Mills, unless somebody else made the exact fabric that we made, which I'm not aware of.

Q When was that fabric made by Novelty Textile Mills?

A I can't tell you. Several years ago.

Q Long before January 1976?

A Oh, sure.

Q That is what you would classify as an Argyle or bias plaid; is that not correct?

A It could be one classification of it.

Q I call your attention specifically to what I call the yellow lines here, and I will ask you:

This yellow which goes under the red in this square and this red which goes under the yellow, if you can tell whether or not they were knit in that fabric as part of the ground bar?

MR. SILBERMAN: Objection.

Your Honor, that exhibit has not been received in evidence as of this time.

THE COURT: Are you going to offer it?

MR. GIBSON: Mark it as Defendant's Exhibit A,

1 gws

Feinberg - cross

2 please.

3 THE COURT: All right.

4 (Defendant's Exhibit A was marked for
5 identification.)

6 MR. GIBSON: We offer it in evidence, your
7 Honor.

8 THE COURT: Any objection, Mr. Silberman?

9 MR. SILBERMAN: No objection, your Honor.

10 THE COURT: Received.

11 (Defendant's Exhibit A for identification was
12 received in evidence.)

13 Q Mr. Feinberg, let's go back and look
14 specifically at one-half of the two lines that make up
15 one-half of the diamonds, and I will ask you if it's not
16 true that those are put into the fabric as part of the
17 ground bar?

18 A Yes, they are.

19 Q Are not the other two lines that make up the
20 other half of the diamonds put on by a design bar?

21 A Yes, they are.

22 Q By the way, Mr. Feinberg, do you claim a copy-
23 right on the fabric which is in the dress, Defendant's
24 Exhibit A?

25 A No, I do not.

1 gws

Feinberg - cross

2 Q Is it not the same type of or general theme
3 of Argyle or bias plaid as your Style 253?

4 A You look at it. You judge.

5 Q I am asking you, sir.

6 A Is it the same? I don't consider them the
7 same at all.

8 Q I asked you if they included the same general
9 theme of Argyle or bias plaid.

10 A In a general way, yes.

11 Q Is it not true that the diamonds or the lines
12 that formed the diamonds and the yarns that formed the
13 spaces in this fabric are made in exactly the same way
14 as the lines and yarns that make up the spaces in your
15 Style 253?

16 A No.

17 Q What is different about it, sir?

18 A It's done differently. It's a different
19 chain, a different design, a different number of stitches.
20 That's a different placement of yarn. It's different
21 yarn, it's different picks per inch. I can't think of
22 one technical thing about it or design thing about it
23 that is the same except they both came out generally in
24 the category of Argyles, which doesn't make them both the
25 same.

gws

Feinberg - cross

75

1 Q You just testified that the ground and one-
2
3 half of the diamonds were formed in the same manner on the
4 ground bar on Defendant's Exhibit A and the other half
5 of the diamonds was formed on a design bar; is that not
6 correct?

7 A That is not correct.

8 Your Honor, I did not say that. I said that
9 in that fabric the yarn that he showed me was in the design
10 bar. One yarn that he showed me was in the ground
11 bar. I said nothing about how it connected with the
12 other one. I didn't compare the two at all. I hate
13 to be repetitive. Let's go back and do it again.

14 Is it not true that one-half of the yarns
15 that form one-half of the diamonds on both the yellow
16 lines and the red lines were put into this fabric along
17 with the ground yarns on the ground bar?

18 A Please say that again.

19 Q Is it not true, Mr. Feinberg, that the yarns
20 that make up the yellow lines, one-half of this diamond,
21 and the red line that makes up one-half of this diamond
22 are put into this fabric along with these black yarns that
23 make up the ground on the ground bar or by the ground
24 bar of the Raschel or warp-knit crochet knitting machine?

25 A Yes. They both laid on the same bar as the

1 gws
2 ground yarn.

3 Q Is it not true, Mr. Feinberg, that the yarns
4 that make up the other half of the yellow diamonds and
5 the other half of the red diamonds are laid in on a design
6 bar?

7 A That is true.

8 Q Does that not give you in the fabric of
9 Defendant's Exhibit A the same over and under effect that
10 you claimed was unique in your Style 253?

11 A I did not claim it was unique, I claimed that
12 it was what it was. I claimed that we made it to come
13 that way.

14 Q So it is not unique in your Style 253; is
15 that not correct, sir?

16 A Under and over is not unique.

17 Q You testified at length about your loss of
18 sales.

19 Is Joan Fabrics the only upholstery manu-
20 facturing company that is manufacturing a bias plaid warp-
21 knit crochet Cidega type fabric?

22 A No.

23 Q Who are the others, sir?

24 A The only one that I know of is Quaker. The
25 only one I know of is Quaker Fabrics.

gws

Feinberg - cross

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Q Do you know when Quaker started?

A Not exactly. It would be during the same period of time or a similar period of time.

Q Do you consider the Quaker fabric to be an infringement of your copyright, sir?

A I would prefer not to answer that, your Honor, if I don't have to.

THE COURT: No, I think you ought to answer it.

A No, I don't.

Q I show you a fabric and I will ask you if you can identify or have you seen that fabric before, Mr. Feinberg?

A What's the name of it? I have seen fabric like this. I don't know if this is the exact one.

Q The fabric that you have seen like that, do you know who it was manufactured by?

A Quaker.

MR. GIBSON: I would like the clerk to mark this as Defendant's Exhibit B.

(Defendant's Exhibit B was marked for identification.)

MR. GIBSON: I will offer it in evidence.

MR. SILBERMAN: No objection.

THE COURT: Received.

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gws

Feinberg - cross

(Defendant's Exhibit B for identification
was received in evidence.)

Q Mr. Feonberg, I hand you back Defendant's
Exhibit B, and I will ask you if that fabric was manu-
factured on a Cidega type knitting machine?

A Except for the fact that I know what it was
manufactured on, that question is unanswerable. But it
is not made on a Cidega type knitting machine because I
happen to know it, not that anybody can tell by looking
at it.

Q Is it made on a Raschel-crochet type knitting
machine?

A No, it is not.

Q What type of machine, do you know, was it
made on?

A It's made on a Raschel machine, not a Raschel
crochet machine. There is a distinction.

Q Let's look at the design, if I may put it up
here where I can see it.

In this fabric, would you classify that as a
bias plaid or an Argyle plaid?

A Yes, I would.

Q Does it have bands of yarns that form zigzags
down the fabric?

gws

Feinberg - cross

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A Yes, they do.

Q Does it have other zigzag lines of yarns that meet apex to apex to form diamonds?

A Yes, they do.

Q All right.

We have two colored bands on here. What color would you call the narrow?

A Beige.

Q Beige?

A Yes.

Q And one is gray?

A More brownish to me.

Q All right.

Can you tell from an examination of this fabric or do you know of your own knowledge whether one of the gray zigzag lines forming one-half of each of the diamonds were put in that fabric as a part of the ground bar or ground yarns?

A I wouldn't want to comment and testify on anything that I haven't had a chance to properly examine. If you want me to testify some time in the future, leave it with me and I will testify on it. Just looking at it now, I don't have any equipment with me and I'm not going to testify.

gws

Feinberg - cross

80

MR. GIBSON: May I have an instruction, your Honor?

THE COURT: No.

Q Can you examine the fabric and tell me whether or not you see instances where the two narrow beige lines pass over and under the gray lines?

A Yes, I do.

Q Do you see instances where the gray lines pass over and under the beige lines?

A Yes, I do.

MR. GIBSON: Excuse me, your Honor.

(Pause.)

Q Mr. Feinberg, do you know whether or not Quaker Fabric Company has ever made another furniture upholstery fabric in a design of an Argyle plaid?

A Do I know that they have made it?

Q Yes. Do you know of any other designs other than Defendant's Exhibit B that Quaker has made in a furniture upholstery fabric?

A Yes.

Q Can you describe for us what other designs you know that Quaker has made?

A They have made other designs. I don't have them with me. I have not examined them. I can't give

gws

Feinberg - cross

81

1 you a correct description. They have made other
2 designs in a bias plaid. I can tell you that. I can't
3 tell you any more about it.
4

5 Q On a Raschel knitting machine?

6 A Yes.

7 Q Do you have samples of those at your company?

8 A Yes, we do.

9 MR. GIBSON: If it's not out of order, your
10 Honor, I would like to ask that those be produced to us
11 at some reasonable convenient time of counsel.

12 THE COURT: I would think it would be more
13 orderly, Mr. Gibson, if they were asked in connection
14 with the production of materials at a later date. They
15 certainly ought to be produced.

16 MR. GIBSON: Thank you, your Honor.

17 Q Mr. Feinberg, have you ever believed or felt
18 that any of the Quaker designs that you know of were an
19 infringement of your copyright?

20 A I had those feelings.

21 Q Did you ever have any discussions or made any
22 charges against Quaker for infringement of your copyright?

23 A Yes, we have. We have written to them.
24 Counsel was in touch with their counsel. They are talk-
25 ing to us about it. They are not ignoring us.

gws

Feinberg - cross

82

1 Q Mr. Feinberg, is it your practice as a manu-
2 facturer of furniture upholstery fabric to obtain samples
3 of furniture upholstery fabric that is on the market by
4 your competitors both in knitted goods and woven goods?
5

6 A I would say yes.

7 Q Is it not true, sir, that there are a
8 relatively large number of bias plaid furniture upholstery
9 designs on the market at the current time by several
10 different manufacturers?

11 A You'll have to qualify what a relatively
12 large number and how many manufacturers.

13 Q More than 10.

14 A Not to my knowledge. I haven't seen them.
15 You know, I can't tell you they are not. I'm not an
16 expert on what's in the market.

17 MR. GIBSON: Excuse me just a moment, your
18 Honor.

19 (Pause.)

20 Q Are you familiar with a company by the name
21 of Phillips-Davis, Incorporated?

22 A Yes, I am.

23 Q Are they a manufacturer of furniture upholstery
24 fabric?

25 A I'm not sure whether they are a manufacturer or

gws

Feinberg - cross

83

1 sales agents or converters or jobbers. I know they
2 sell upholstery fabrics. I don't know if they are
3 manufacturers or not.
4

5 Q I hand you a fabric sample and I will ask you
6 if you have seen that fabric on the market for furniture
7 upholstery purposes?

8 A No, I have not.

9 Q Isn't it entirely possible, Mr. Feinberg,
10 that all of your loss of sales cannot be attributed to
11 Joan, but that Quaker may have taken some of those sales
12 or some other company?

13 A Anything -- there's nothing that anyone can say
14 is impossible.

15 In answer to your question, it's possible.
16 But, to our knowledge, in every instance that we are aware
17 of where we have lost business on 253, it's been to Joan.
18 That's my answer.

19 Q You testified that you had lost business in
20 the amount of \$11,000 a week and that you simply took what
21 your sales had been during the peak period and deducted
22 what they were now from that and arrived at that figure.

23 A That's not so again.

24 Q Tell me how you did arrive at the \$11,000 a
25 week.

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Feinberg - cross

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A We took the rate that was coming in during a certain period of time that I testified to, then we took the rate through October, then we took the rate after October, the average rate of each. We modified that by the way all our business came in completely. In other words, if our business doubled, then we doubled that. If our business came in half, then we cut it in half. So it's exactly proportionate to all of our business. We didn't select that one number out.

If our business was down generally, then we modified our loss by that same percentage that our business was down. If our business was down 10 percent, we modified that number by 10 percent. Our business was not down except on 253.

Q So, in effect, you attributed all of your loss of sales to 253 to the defendant?

A That would be my opinion.

Q And none to Quaker or to anybody else?

A I say -- I haven't run into it. It may be. Not to my knowledge.

Q But you have been gathering samples of Quaker fabric out in the marketplace; is that not correct, sir?

A That's correct.

THE COURT: Is there any kind of a seasonal

1 gws

2 element in this?

3 THE WITNESS: There are seasonal elements,
4 sir.

5 THE COURT: What I am asking you is, in effect,
6 you had a period of time, let's say, between January and
7 October. Is there a further period of time after
8 October where sales slough off in these materials?

9 THE WITNESS: I would think --

10 THE COURT: Where is the season?

11 THE WITNESS: It varies because there's been --
12 I must say that Larry Ansin would be more qualified than
13 me. I have been in this end of the business a shorter
14 time. There are seasonal variations that can be
15 measured by months. There are also variations in the
16 amount of business where business can be down in what
17 would normally have been expected to be the peak months.
18 I have seen it in the short time, four or five years I
19 have been in it.

20 During peak months business has been down
21 because of economic conditions or other reasons. There's
22 no rule that you can say. The time our business fell
23 down is when business normally should have gone up. It's
24 very hard to tie it together.

25 The only way we could tie it together, which I

1 gws Feinberg - cross

2 think is a fair, equitable way, is to tie it to our
3 whole line.

4 If the business in the balance of our line
5 stayed stable and the business in that one number went
6 down dramatically, then I would have to attribute it
7 to some other reason other than seasonal or economic
8 conditions. That's what we have done. We have
9 weighed it against our entire other balance of the line.

10 Q Mr. Feinberg, in the apparel business how
11 long does a particular fabric design last generally?

12 A It varies according to the nature of the
13 fabric. Sometimes in the apparel industry they only last
14 a season. I have fabrics -- they are rare to be sure --
15 that are running for years.

16 THE COURT: Let's stay in the furniture
17 business.

18 THE WITNESS: He said apparel.

19 MR. GIBSON: Yes, I did.

20 THE COURT: Let's stay in the furniture
21 business.

22 Q How about the furniture business, do your
23 designs in furniture upholstery fabric last forever?

24 A I'm still running every fabric that I sold in
25 my first line, so I can't tell you how long they last.

gws

Feinberg - cross

87

1 It's been for seven markets now. They are still selling,
2 and some of them are selling as well as they sold seven
3 markets ago.
4

5 Q Some, but not all, sir?

6 A Not all.

7 Q Some of them peak and then drop off; is that
8 not correct?

9 A But they are still selling.

10 Q But you still sell some of them?

11 A Every single fabric that I sold in my first
12 line is still selling.

13 Q You are still selling Style 523, are you not,
14 sir?

15 A Barely.

16 Q But you are still selling it, aren't you, sir?

17 A Yes.

18 Q You are still selling Style 256, too, aren't
19 you?

20 A No, sir.

21 Q You are not selling it? You have withdrawn
22 it from the line?

23 A No, we are not selling it. Nobody --
24 we haven't had an order placed on it. We haven't had
25 an order on 256 so far in the entire month of January.

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Feinberg - cross

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Q What did your Style 256 sell for a yard?

A 5.45.

Q Same as your Style 253?

A Same as 253.

MR. GIBSON: Excuse me one minute, your Honor.

(Pause.)

Q I believe you testified on direct, Mr. Feinberg, that you saw Brookwood showing defendant's fabric at the October market; is that correct?

A Yes, I did.

Q Was this fabric that Brookwood was showing on a piece of furniture?

A They had it on more than one piece of furniture.

Q What styles of Joan was that?

A It's either one of the two styles. I can't tell you now, in retrospect, because I didn't get a sample of it. Either the CK 0028 or the Fleetwood.

Q Either --

A In the colors that are shown there. One of them is --

Q Plaintiff's Exhibit 5 is Fleetwood. That is this one here, sir.

A Yes. Color what?

1 gws

2 Q This one is Plaintiff's Exhibit 6.

3 A Yes, but what's the color of that one?

4 Q This one?

5 A The other one.

6 Q This one?

7 A Yes.

8 Q That is Fleetwood Spice.

9 A It was either Fleetwood Spice or CK 0028 in
10 that color combination. I can't tell you which.

11 Q That is Plaintiff's Exhibit 6 you are referring
12 to, the one I am touching?

13 A Right. It was one of those two or a similar
14 one. It could have been a third one. I hear there's
15 three numbers I never even had access to.

16 Q Sir, I would like to show you Plaintiff's
17 Exhibit 4 and Plaintiff's Exhibit 2.

18 I will ask you, sir, if you will examine the
19 ground yarns within the diamonds on Plaintiff's Exhibit 4.

20 A All right, I'm examining it.

21 Q Is it not true, sir, that the yarns that make
22 up the ground within the diamonds on Plaintiff's Exhibit 4
23 are substantially the same size yarns throughout that
24 diamond?

25 A I have to say that -- I'll have to rephrase it

gws

Feinberg - cross

90

1 if you don't mind and say that the yarns in the ground
2 vary considerably in size from place to place in the
3 yarn.
4

5 Q Are they slub yarns?

6 A They vary considerably in size. I probably
7 might not categorize them as slub yarns. They certainly
8 are variable in size. They are thicker and thinner in
9 the yarn.

10 Q Do you see the ground or backshot and the
11 rubber showing through the yarns and the ground on
12 Plaintiff's Exhibit 4 like you do on Plaintiff's
13 Exhibit 2?

14 A Oh my, yes.

15 Q To the same extent?

16 A Overall I would say more.

17 Q More so?

18 A I would think so, if anything. If anything,
19 overall, you see it more.

20 Q All right, sir. How about the size of the
21 yarns that make up, shall we say, the light brown narrow
22 stripes here, do those appear to you to be plied yarn of
23 two yarns plied together?

24 A No, there is simply an overfed yarn on a core
25 which is one of the components on ours.

gws

Feinberg - cross

91

Q But not two yarns plied together?

A No.

THE COURT: Mr. Gibson, I think you are wasting your time. I think you are wasting the Court's time in going through this kind of an examination because the question is what does the fabric look like to the average lay person. No lay person is going to know what you are talking about, including this lay person, 24 hours from now.

The question is: Is it a copy or isn't it a copy? Is it an infringement or isn't it an infringement? And the number of yarns that are together or whether it's a yarn or a core is not going to cut the mustard.

MR. GIBSON: All right, your Honor. Thank you.

Q Isn't it true that in the broad stripes the yarns that make up that stripe are not laid in together, they are not contiguous, but they are spaced apart so that you observe ground yarns in between?

A Two are together and two on either side are separated.

Q So you get a striated or striped band effect?

A Okay.

Q Is that correct?

A Yes.

1 gws

Feinberg - cross

92

2 Q Let's look at the size of the diamonds.

3 Could you compare the size of the diamonds on
4 Plaintiff's Exhibit 4 to Plaintiff's Exhibit 2 and tell
5 me whether they are the same size or if it's not true
6 that the size of the diamond on Plaintiff's Exhibit 4
7 is considerably smaller than the diamond on Plaintiff's
8 Exhibit 2?

9 A No, it is not considerably smaller.

10 Q How much smaller is it?

11 A In width it is practically identical.

12 In length, because they are using finer yarns, making a
13 cheaper fabric, they are running a slightly tighter pick
14 and it is slightly shorter in the length. They are
15 very close in size, as you can see. There they are.

16 MR. GIBSON: Excuse me, your Honor.

17 (Pause.)

18 MR. GIBSON: That is all we have, your Honor.

19 THE COURT: All right.

20 REDIRECT EXAMINATION

21 BY MR. SILBERMAN:

22 Q Mr. Feinberg, when I advised you that I required
23 samples of your fabric for the purposes of obtaining a
24 copyright, can you tell me what fabrics you sent to me?

25 A I sent you 253.

1 gws

2 Q In what color?

3 A Cane.

4 Q During your visitation of showrooms at the
5 market in High Point in October of 1976, did you see
6 Quaker, the Quaker Fabrics design in accordance with
7 Exhibit B on any of the upholstered furniture?

8 A No, I did not.

9 Q I believe you testified on cross-examination
10 that a charge of infringement has been levied against
11 Quaker Fabrics, is that correct, a charge of copyright
12 infringement?

13 A Is that what we did? We wrote them a
14 letter.

15 Q Then you authorized your counsel to write a
16 letter claiming violation of rights; is that correct?

17 A Yes.

18 Q Violation of copyright?

19 A Yes.

20 Q Was that charge of infringement directed to a
21 fabric similar to Defendant's Exhibit B?

22 A Yes.

23 Q What fabric style of Novelty was that
24 based on?

25 A 253 and 256.

1 gws

Feinberg - redirect

2 Q To your knowledge, has that charge of infringe-
3 ment been resolved?

4 A No.

5 Q Has the charge of infringement been withdrawn?

6 A No.

7 MR. SILBERMAN: No further questions, your
8 Honor.

9 MR. GIBSON: No recross, your Honor.

10 THE COURT: All right.

11 You are excused.

(Witness excused.)

12 MR. SILBERMAN: Your Honor, the plaintiff has
13 no further witnesses.

14 THE COURT: Mr. Gibson.

15 MR. GIBSON: If your Honor please, at this time
16 I don't think the plaintiff has made out a prima facie
17 case because we still don't have in evidence what was
18 filed with the Copyright Office as representative of the
19 copyright.

20 THE COURT: Mr. Silberman, do you know?

21 MR. SILBERMAN: Yes, your Honor. It was 253
22 Cane based on the samples that Mr. Feinberg supplied to
23 me.

24 THE COURT: You make a representation of that

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2 to the Court?

3 MR. SILBERMAN: Yes.

4 THE COURT: I will take that.

5 MR. GIBSON: Your Honor, defendant calls
6 Lawrence Ansin.

7 - -

8 L A W R E N C E A N S I N , called as a witness by
9 the defendant, being first duly sworn, testified as
10 follows:

11 DIRECT EXAMINATION

12 BY MR. GIBSON:

13 Q Mr. Ansin, where do you reside?

14 A Lexington, Massachusetts.

15 Q Are you associated with Joan Fabrics Corporation?

16 A Yes, I am.

17 Q In what capacity?

18 A President.

19 Q How long have you been president of Joan
20 Fabrics Corporation?

21 A Since December of 1972.

22 Q Is Joan Fabrics Corporation in the business of
23 manufacturing upholstered fabrics?

24 A Yes.

25 Q How long had the defendant in this action been

gws

Ansin - direct

96

1
2 in that business?

3 A Since the early '30s.

4 Q How many plants does the defendant have?

5 A Eight.

6 Q Is the defendant an integrated operation?

7 A Yes.

8 Q Would you explain what that means?

9 A We do our own yarn manufacturing, our own weav-
10 ing, our own dyeing, our own coating and our own finishing.
11 We also have our own sales force, 100 percent working for
12 Joan.

13 Q Do you also operation knitting plants?

14 A Yes.

15 Q Do you have what has been described as Cidega
16 knitting machines?

17 A Yes.

18 Q Does Joan Fabrics or the defendant have any
19 design facilities?

20 A Yes.

21 Q Would you describe the design facilities which
22 the defendant has?

23 A We have our in-house design staff, which is a
24 total of 10 designers working full-time for Joan.

25 Q Approximately how many new designs of upholstery

1 gws Ansin - direct 97

2 fabric does the defendant develop each year?

3 A Five to six hundred patterns.

4 Q Does the defendant from time to time utilize
5 outside design consultants?

6 A Yes.

7 Q Is the defendant in this action through its
8 officers familiar with the copyright system of the United
9 States?

10 A Very much so.

11 Q Do you participate or take advantage of that
12 system in any way?

13 A Yes, we do.

14 Q Approximately how many United States copyright
15 registrations does the defendant own?

16 A In the neighborhood of 500.

17 Q Does the defendant have any corporate policy
18 with respect to copyrights, both of its own and of others?

19 A Absolutely.

20 Q What is that policy?

21 A Our own?

22 Q Yes.

23 A Every patent that goes into our line is sent
24 to Mr. Julian Carnes, who submits it to, I assume,
25 Washington for patent approval or copyright approval --

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Ansin - direct

excuse me, copyright approval.

Q What is the corporate policy with respect to
copyright protection of others?

A We in no way will infringe on anyone's copyright
in any way, shape or manner.

Q How long has the defendant known of the plaintiff
in this action, Mr. Ansing?

A Six years, seven years.

Q In what capacity or relationship has the
defendant known the plaintiff?

A My original knowledge of Mr. Feinberg was his
interest that he owned in Thomas Hodgson, a yarn company
that we bought Novelty yarns from.

Q What other relationship has the defendant had
to the plaintiff?

A Since that time we became aware, when he
introduced his fabrics into the furniture trade, they
were selling upholstery fabrics into our industry. We
also became very aware of Mr. Feinberg when we bought the
Cidega Machine Manufacturing Company and he was a customer
of the Cidega Machine Manufacturing Company.

Q So it is your testimony that the defendant in
this action now owns the Cidega Manufacturing Company?

A Yes, sir.

1 gws

Ansinn - direct

2 Q When did you acquire that company or when
3 did the defendant acquire that company, sir?

4 A May of 1976.

5 Q In connection with its design efforts and its
6 marketing efforts, does the defendant attend the furniture
7 markets or send people to the furniture markets?

8 A Yes.

9 Q Has that been a practice over several years?

10 A This has been a practice for as long as I can
11 remember, as long as I have been in this business. We
12 send people to the High Point shows each April and October
13 and we send people to the regional markets also, be it
14 Chicago, Dallas, Los Angeles, San Francisco, Atlanta or
15 Toronto.

16 Q Was that true in April of 1976?

17 A Yes.

18 Q Did you attend the April 1976 show?

19 A Yes.

20 Q At that show did you receive any knowledge or
21 information with respect to the market for bias plaids
22 or Argyle plaids in the furniture upholstery business?

23 A I directly, no.

24 Q Did the personnel of the defendant receive
25 such information and subsequently impart it to you?

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Ansin - direct

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A Yes.

Q What action did the defendant take based on that information, if any?

A After the April market you are talking about?

Q Yes.

A After the April market we had a style review the first week in May, that we all got together and reviewed designing for our new line, for the next October line. At that meeting we discussed bias and Argyle plaids of Cidega equipment.

Q All right, sir.

Who was at the particular meeting in May of 1976?

A Mr. Arthur Zellers, Mr. Bill Ross, Mr. Bob Gangi.

Q What is Mr. Zeller's capacity in defendant?

A Executive vice-president in charge of merchandising and design.

Q What is Mr. Ross' capacity in defendant?

A Mr. Ross, is our head stylist and designer.

Q What is Mr. Gangi's position with the defendant?

A Mr. Gangi is our knit technician and knit designer.

Q Was any decision reached at the styling meeting

1 gws Ansin - direct 101
2 in May of 1976?
3 A Yes.
4 Q What was that decision?
5 A The decision was to manufacture or design an
6 Argyle or bias plaid, but it was specifically told to
7 the design department to make original creations.
8 Q Were there any samples of any fabrics or
9 any competitor's fabrics present or considered at the
10 meeting where this decision was made?
11 A No.
12 Q Was any action taken upon the decision or
13 instructions that were given to the design department?
14 A Yes.
15 Q What action was that?
16 A I directly am not involved in design or aware
17 of what transpires in the daily designing in our business.
18 I was aware the first week in June as to the styles that
19 had been designed off our Cidega equipment.
20 Q When you became aware of the designs that had
21 been developed or designed for the Cidega equipment, what
22 action did you take?
23 A I was very concerned about our originality and
24 our creativity of these fabrics and wanted to make sure
25 that the fabrics were original creations.

gws

Ansin - direct

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1
2 I, therefore, called our legal counsel to come
3 to Lowell and to pass an opinion on these fabrics before
4 we introduced them to the market.

5 Q At the time you called your legal counsel to
6 Lowell, did you have a sample of the plaintiff's fabric
7 at that time?

8 A Yes.

9 Q Was a comparison made between the plaintiff's
10 fabric and the designs which your design department had
11 developed?

12 A Yes.

13 Q Mr. Ansin, do you have any input or control
14 over the way in which your company's fabrics are marketed
15 or represented to the public from a policy standpoint?

16 A Yes.

17 Q To your knowledge, has the defendant's fabrics
18 in this bias plaid line ever been offered or sold as
19 imitations of or substitutes for the plaintiff's
20 fabrics?

21 A Not to my knowledge.

22 Q Would that be against the policy of your
23 company?

24 A Absolutely.

25 Q Have you ever had any reaction or any inform-

1 gws

Ansin - direct

2 ation from the trade that anyone had confused the
3 defendant's fabrics with those of the plaintiff?

4 A No, sir.

5 Q Have you had any information or reaction to the
6 contrary, that they recognized that it was different?

7 A Yes.

8 Q How has your company's bias plaid designs
9 been received, Mr. Ansin?

10 A Well, but I wish they were selling better.

11 Q You heard Mr. Feinberg's testimony concerning
12 Brookwood; is that correct?

13 A Yes, I did.

14 Q Has your company ever sold Brookwood Furniture
15 Company either Fleetwood or CK 28?

16 A To the best of my knowledge, with the records
17 I have available, no.

18 Q Have you sold Brookwood Furniture Company any
19 of your other bias plaid designs?

20 A No.

21 Q Do you still sell Schnadig?

22 A Yes.

23 Q Part of your bias plaid design?

24 A Yes, sir, we do.

25 Q To your knowledge, has Schnadig bought your

1 gws

Ansin - direct

2 bias plaid designs at the same time Schnadig was buying
3 the plaintiff's bias plaid designs?

4 A Yes.

5 Q Have you sold Kroehler your bias plaid designs?

6 A Yes.

7 Q To your knowledge, has Kroehler bought your
8 bias plaid designs at the same time Kroehler was buying
9 plaintiff's bias plaid designs?

10 A Yes.

11 Q Are there other furniture companies that you
12 know of that have purchased the defendant's bias plaid
13 designs at the same time they were purchasing plaintiff's
14 bias plaid designs?

15 A Yes.

16 Q Mr. Ansin, based on your experience in the
17 furniture upholstery fabric market, do you consider
18 plaintiff's bias plaid designs to be a copy or an
19 individual design from plaintiff's Style 253?

20 MR. SILBERMAN: Objection, your Honor. I think
21 that calls for a legal conclusion.

22 THE COURT: It calls for a conclusion. I will
23 let him answer it. He's had enough experience in the
24 business. He doesn't consider it, Mr. Feinberg considers
25 it.

gws

Ansin - direct

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MR. SILBERMAN: Fine, your Honor.

A The Judge answered for me.

Q Go ahead and answer for the record.

Do you consider it to be an original design or
a copy?

A An original design.

Q Thank you.

MR. GIBSON: I have no further questions at
this time.

CROSS EXAMINATION

BY MR. SILBERMAN:

Q Mr. Ansin, how long has your company had the
corporate policy of not infringing copyrights of others?

A Since 1972. Again I'm talking off the top
of my head. But the reason I can give you a specific
date why is because it's in the records, and I can get
the specific date for you at some future date if it's
needed.

Q What is the reason?

A We were asked to manufacture, to copy a fabric
that was given to us by one of our customers. We did so.

We copied it pick for pick and end for end.
We submitted it to the customer and we were in violation
of a copyright. We were not aware that the fabric was

1 gws

Ansin - cross

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2 copyrighted. There was no label on the fabric when it
3 was given to us that it was a copywritten fabric.

4 We, therefore, as soon as we found out it
5 was a copywritten fabric, we withdraw that fabric from
6 sales. That was the first time our company had even been
7 aware of copywriting of upholstery fabrics, and it was
8 at that date that we made that decision to copyright all
9 our own fabrics.

10 Q Who was the customer?

11 A Simmons.

12 Q Who was the copyright owner of the fabric that
13 you were charged with infringement?

14 A Wyoming Weavers.

15 Q Since that date has Joan, other than the letter
16 addressed to you which charged you with infringement in
17 this matter, received any other letters charging copyright
18 infringement?

19 A No.

20 Q You testified to a styling review meeting
21 during the first week of May 1976 attended by Messrs.
22 Zellers, Ross and Gangi.

23 Were you at that meeting?

24 A Yes, I was.

25 Q Who told the design department to make an

1 gws

Ansinn - cross

2 original creation?

3 A I did.

4 Q Who was the individual who expressed concern
5 about the originality of the Joan Argyles?

6 A There was not concern in the originality,
7 there was concern on my part because of the tremendous
8 interrelationship that existed at that time in June between
9 Mr. Feinberg and two companies that he has an interest in,
10 one being Novelty Textile, the other being Thomas Hodgson.

11 I wanted to make sure that we were in no way
12 in violation of any type of a copyright. It is the
13 first time that we have -- that I or our company has ever
14 called in counsel to pass on a fabric before it goes into
15 the line.

16 The reason I did that was because we were
17 getting a tremendous amount of yarn from Thomas Hodgson,
18 which is owned by Mr. Feinberg. This yarn was used in
19 our flat textured woven upholstery line and we were afraid
20 that if we were in violation to any degree, that we may
21 not be able to obtain these yarns in the future.

22 Q In other words, --

23 A Excuse me.

24 Q Go ahead.

25 A The other reason was that Mr. Feinberg and

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Ansin - cross

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Novelty Textile was also a very good customer of the Cidega Machine Company that we had just bought. I did not want to disrupt that relationship or the relationship at Thomas Hodgson. That is why in this instance I took it upon myself to get legal opinion before we introduced this fabric into the line.

Q When you say "this fabric," which fabric are you talking about?

A I'm talking about 0028 and 0035.

Q 0035, is that a design which has since been discontinued as unsuccessful?

A Yes.

Q And 0028 is Exhibit 5; is that correct?

MR. GIBSON: No.

Q That is Exhibit 4; is that correct?

A Yes.

Q And Exhibit 6?

A I'm not an expert. Yes.

Q Thank you.

Did an attorney come to Lowell to pass upon these designs?

A Yes.

Q What was his name?

A Mr. Julian Carnes.

1 gws Ansin - cross 109

2 Q Did he submit a legal opinion to you?

3 A Yes, he did.

4 Q Do you have a copy of that in your files?

5 A I don't know.

6 Q Were any other legal opinions obtained on
7 possibility of copyright infringement based on Novelty
8 Style 253?

9 A That was the only opinion.

10 Q Did Mr. Carnes give you an oral opinion at the
11 time he was in Lowell, Massachusetts?

12 A Yes, he did.

13 Q What was that oral opinion?

14 A He felt --

15 MR. GIBSON: Objection, your Honor, as
16 privileged communication.

17 MR. SILBERMAN: Your Honor, that has been waived
18 in their papers they have submitted and the documents, and
19 Mr. Ansin has also testified this morning that they
20 requested a legal opinion, they obtained a legal opinion.
21 Therefore, I submit that the attorney-client privilege has
22 been waived completely.

23 THE COURT: I tell you it's pretty late in
24 the afternoon. Whatever that attorney's opinion might
25 be --

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Ansinn - cross

2 MR. GIBSON: I will withdraw the objection,
3 your Honor.

4 THE COURT: -- is not going to decide the case
5 for me.

6 MR. SILBERMAN: I will withdraw the question,
7 your Honor.

8 MR. GIBSON: I will withdraw the objection.

9 Q Do you recall the approximate or the exact,
10 if possible, date on which Mr. Carnes came to Lowell?

11 A No, I don't.

12 Q Would it have been in May?

13 A No, it was in the middle of June.

14 Q What did you show Mr. Carnes?

15 A I already told you. I showed him pattern
16 0028 and 0035.

17 Q Did you show him 253, Novelty 253?

18 A I'm sure, yes.

19 Q You testified that it was the reaction of
20 customers of Joan that the Joan Argyles were different
21 than the Novelty 253 Argyles; is that correct?

22 A Would you please state that again.

23 Q I believe you testified that the Joan Argyles
24 were different, that customers stated that the Joan
25 Argyles were different than the Novelty Argyle Design 253;

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Ansin - cross

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1 is that correct?

2
3 A I don't know if I stated it that way.
4 I think the way the question was asked is that with
5 customers running both fabrics. I can't say what the
6 customers themselves, what their opinion was.

7 Q Mr. Gibson asked you whether the Joan fabrics
8 had ever been sold as imitations of the Novelty fabrics
9 and you testified in the negative.

10 A That is correct.

11 Q Then he also asked you whether customers recog-
12 nized the Joan fabrics as being substitutions or the same
13 as the Novelty fabrics, and you testified in the negative;
14 is that correct?

15 A They did not consider the fabrics to be the
16 same.

17 Q How did it come about that customers conveyed
18 to you their opinion that the fabrics were not the same?
19 Did you ask them?

20 A I did not get involved in sales. I was not
21 involved in the actual showing of the fabrics to each
22 customer.

23 When we went to the shows and we saw our fabric
24 made up on furniture and novelty's fabric made up on
25 furniture, they stated to us that they were two separate

1 gws Ansin - cross
2 fabrics, two separate identities.

3 Q When did Joan first introduce its Exhibits 4,
4 5 and 6?

5 A We historically send our samples out to the
6 trade the 1st of July. So it would have been the first
7 week in July 1976.

8 Q Have sales grown since that date?

9 A Starting from base zero, yes.

10 Q What kind of volume are you doing in Exhibits 4,
11 5 and 6 today?

12 A Excuse me. Do you mean volume to date or
13 on a weekly average?

14 Q On a weekly basis.

15 A I can't break it down on a weekly basis.

16 I don't have those figures in front of me. But since
17 July 1st to this date we have sold approximately 550
18 pieces in those two styles. 550 divided by how many
19 weeks since we introduced that fabric would give you the
20 average sales per week.

21 Q What is a piece?

22 A 50 yards. Let me restate that, 50 to 55
23 yards. In our industry it varies. 55 may be a
24 better base to use than 50.

25 Q At what price do you sell CK 0028?

1 gws

Ansin - cross

2 A \$4.50 a yard.

3 Q What price do you sell Fleetwood?

4 A \$4.50 a yard.

5 Q You testified in response to questions by
6 Mr. Gibson that you were aware that Schnadig was buying
7 Joan fabric, either CK 0028 or Fleetwood, at the same time
8 it was buying Novelty's fabric; is that correct?

9 A State that once more, please.

10 Q Let me restate the question.

11 Has Schnadig purchased CK 0028?

12 A I'd have to get my records to tell you.

13 I don't know.

14 Q Would it have been either CK 0028 or Fleetwood?

15 A Yes.

16 Q All right.

17 So when we talk about purchases by Schnadig,
18 we are talking about purchases of either Exhibit 5 or
19 Exhibits 4 or 6?

20 A Correct.

21 Q Am I correct that you testified that you
22 were aware that Schnadig was buying the Joan fabric at the
23 same time it was buying Novelty's fabric?

24 A They are buying both fabrics today.

25 Q Today?

1 gws

Ansinn - cross

2 A Yes.

3 Q How do you know that?

4 A I received confirmation on that Tuesday of
5 this week.

6 Q From whom?

7 A Mr. Larry Schnadig, Jr.

8 Q Did Mr. Larry Schnadig, Jr. state what color
9 of Novelty's fabric he was buying?

10 A I didn't ask him.

11 Q Do you know whether he was buying Cane?

12 A I have no idea.

13 Q Are the colors represented by Exhibits 5 and 6,
14 one or the other, the color combination that Joan is
15 selling to Schnadig?

16 A To the best of my knowledge.

17 Q Do you know which style Kroehler is purchasing
18 from Joan?

19 A No, I'm not familiar.

20 Q Would it either be CK 0028 or Fleetwood?

21 A It's one or the other.

22 Q All right.

23 Would it be in the color combinations repre-
24 sented by either Exhibits 5 or 6?

25 A I'm not familiar.

1 gws

Ansinn - cross

2 Q Do you know? Do you have records here?

3 A Yes.

4 Q Would you like to look at your records?

5 A Sure. What were the two colors or color
6 you were questioning on?

7 Q With respect to Fleetwood, it would be Spice;
8 with respect to CK 0028, it would be Sand.

9 A On pattern Fleetwood, Kroehler to date has
10 bought a total of 30 yards of color Spice.

11 Q 30 yards or pieces?

12 A 30 yards, and they have no bought color Sand.

13 Q Other than 30 yards of Fleetwood Spice, is
14 Kroehler buying Fleetwood?

15 A Fleetwood?

16 Q Yes.

17 A Unless my records are wrong, I think we only
18 have one color in Fleetwood. Spice is the only color
19 we have in Fleetwood. We don't have an extensive
20 color line.

21 Excuse me, from the placement sheet, maybe
22 those are new colors that have come out in the last
23 couple of weeks, two weeks. I'm sorry, your Honor
24 We have added some colors in the last two weeks. Those
25 are new colors that have been added in the last two weeks.

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Ansin - cross

Q In the last two weeks colors Chestnut, Rust,
Autumn and Russet?

A The colors that you are talking about have
been added in the last two weeks and have not yet been
shown or sold. So the 30 yards that were sold was
also Spice, and that's all we sold them in Fleetwood.

Q How about in CK 0028, how much have you
sold?

A They did not buy the color Sand in question.

Q Any color in CK 0028.

A 426 yards.

Q Of?

A I don't know the color. I know the two colors
we have sold them, but the computer does not break down
sales by color.

Q So Kroehler has purchased 426 yards of CK 0028?

A That is correct.

Q How many yards of CK 0035 has Kroehler
purchased?

A We sold a total of 38 yards in total of
0035 and we dropped the fabric.

Q A total to all purchasers?

A The whole industry.

Q Okay.

gws

Ansin - cross

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2 A I could be wrong by a few yards. It's in
3 the 30's. It's either 38 or 36.

4 Q Not very profitable, I would assume?

5 A No.

6 Q CK 0042, how many yards has Kroehler purchased?

7 A I thought I just gave that to you.

8 Q No.

9 A 0042, they have purchased 3054 yards.

10 Q With respect to Schnadig, am I correct that
11 he testified that Schnadig has not purchased any CK 0028?

12 A No, I didn't say tht. Excuse me. I'm
13 looking at the wrong line.

14 0028, they did not purchase anything, that's
15 correct.

16 Q How many yards, if any, of CK 0042 has
17 Schnadig purchased?

18 A I have to add up two plants.

19 5598 yards.

20 Q How many yards of Electra has Schnadig
21 purchased?

22 A Electra, to my knowledge, is a new pattern and
23 it hasn't had any sales to date.

24 Q To anyone; is that correct?

25 A To my knowledge.

1 gws Ansin - cross

2 Q Do you have records here that would show
3 the total number of CK 0042 that was sold to anyone to
4 date?

5 A 14,708 yards, and that is through the 13th
6 of January, and that report goes from July 1st.

7 Q Do you have present in the courtroom today
8 a sample of CK 0042 in Spice?

9 A I would assume so.

10 MR. SILBERMAN: We have it listed in defendant's
11 addendum to Volume 1 --

12 MR. GIBSON: We have it. It will just take a
13 minute to find it.

14 THE COURT: We will take a short recess.

15 (Recess.)

16 BY MR. SILBERMAN:

17 Q Mr. Ansin, I show you a sample of a fabric
18 that has a Joan Fabrics Corporation header on it which is
19 marked in pen with the number CK 0042 and with the color
20 Spiece, and ask if you can identify that?

21 A Yes, it is such as labeled.

22 MR. SILBERMAN: May we have that marked as
23 Plaintiff's Exhibit 11.

24 MR. GIBSON: If your Honor please, at this
25 time why don't we just mark it as a defendant's exhibit.

1 gws Ansin - cross

2 We had it in our book as one of our exhibits.

3 MR. SILBERMAN: No objection.

4 THE COURT: It makes no difference.

5 Defendant's Exhibit C. It is received.

6 I assume you have no objection.

7 MR. GIBSON: No objection.

8 THE COURT: All right.

9 (Defendant's Exhibit C was received in

10 evidence.)

xx 11 Q Mr. Ansin, Defendant's Exhibit C is the
12 CK 0042 to which you testified Joan has sold 14,708 yards;
13 is that correct?

14 A That is correct.

15 Q Does Defendant's Exhibit C come in any other
16 color combinations other than Spice?

17 A I don't know. I don't know offhand.

18 MR. GIBSON: If your Honor please, we have in
19 the courtroom someone who has a lot more intimate knowledge
20 of that than Mr. Ansin, who we are going to put on if that
21 might shorten it.

22 THE COURT: Yes.

23 MR. SILBERMAN: Your Honor, this is the first
24 opportunity we have had to see CK 0042, and we direct
25 our charge of copyright infringement to that particular

1 gws

2 fabric.

3 Q Mr. Ansin, what is the price at which you sell
4 CK 0042?

5 A \$4.50 a yard.

6 Q Do you ever sell CK 0028, Fleetwood, or
7 CK 0042 at a price less than \$4.50 per yard?

8 A Yes.

9 Q Under what circumstances?

10 A When the competitive market dictates it.

11 Q What is the competitive market? How do you
12 define the competitive market in CK 0028, Fleetwood,
13 CK 0042? What is the competitive market in those
14 fabrics?

15 A People who are manufacturing Cidega knit
16 fabrics.

17 Q Of any design?

18 A No, of designs made from -- on the Argyle plaid
19 type.

20 Q Are you then testifying that you consider all
21 Argyle designs to be competitive?

22 A No, I said of Cidega equipment or Cidega type
23 equipment. More specifically, Providence Pipe.

24 Q Is that company also known as Quaker?

25 A I think Quaker is their sales agency name.

gws

Ansin - cross

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I think they go under the corporate name of Providence Pipe.

Q Do you know at what price they sell their Argyle plaids?

A I have heard anywhere from under \$4 to \$4.50.

Q Have you ever heard of Novelty's styles similar to Exhibit 3 being sold at under \$5?

A No. We don't consider that a competitive fabric.

Q Do you consider the Novelty fabric to be a higher quality fabric?

A No.

Q Does it have more yarn in it?

A I'm not a technician. I can't answer that.

THE COURT: What do you base your answer on, that it's not a higher quality fabric?

THE WITNESS: Excuse me? Whose fabric is not a higher --

THE COURT: The question was asked whether the Novelty fabric was a better quality fabric. You said, "No."

The second question, you said, "I'm not an expert."

I am asking you: What do you base your first

1 gws

Ansinn - cross

2 opinion on?

3 THE WITNESS: Just because our fabric sells
4 at a lower price does not mean that it's made any inferior
5 to their product.

6 THE COURT: That is not responsive to my
7 question.

8 THE WITNESS: I don't see --

9 THE COURT: Would you like to withdraw your
10 first answer? I will give you that opportunity, and
11 then maybe we can ask your expert.

12 THE WITNESS: Fine.

13 MR. SILBERMAN: I am finished, your Honor.

14 MR. GIBSON: No redirect, your Honor.

15 THE COURT: All right.

16 You are excused.

17 (Witness excused.)

18 THE COURT: Mr. Gibson, I would ask you to put
19 on the witness that you think is the one who has the
20 broadest possible knowledge of this subject matter so
21 that we can shorten this down. This is a hearing with
22 respect to a preliminary injunction.

23 MR. GIBSON: If your Honor please, we have all
24 three of the people who participated in the design effort
25 here. We are going to try to shorten it as much as

1 gws

2 possible.

3 We are going to call Mr. Gangi at this time
4 because he has the broadest knowledge of knit styling and
5 we are going to put him on. If we can do with him, we
6 will stop there.

7 THE COURT: All right.

8 MR. GIBSON: We may have to call one other for
9 a very limited purpose.

10 THE COURT: All right.

11 MR. GIBSON: If the Court please, Mr. Turner
12 will interrogate Mr. Gangi.

13 THE COURT: Fine.

14 MR. TURNER: Call Mr. Robert Gangi.

15 - -

16 R O B E R T G A N G I , called as a witness by the
17 defendant, being first duly sworn, testified as
18 follows:

19 DIRECT EXAMINATION

20 BY MR. TURNER:

21 Q What is your address, Mr. Gangi?

22 A My address is 62 Park Avenue, Emerson, New
23 Jersey.

24 Q What is your present employment?

25 A I'm an employee of Joan Fabrics.

gws

Gangi - direct

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Q In what capacity?

A I am the director of knit development manufacturing and marketing.

Q How long have you been employed by Joan?

A About a year.

Q Would you briefly summarize for us your work experience prior to coming with Joan?

A I was the executive vice-president of Tri-R Industries and I was in charge of development of knitted fabrics and marketing.

Q What was the business of Tri-R Industries?

A We were knitters, Cidega-type knitters commissioned in direct sale.

Q Is it correct that Tri-R did own and operate Cidega machines?

A Oh, yes.

Q At Tri-R Fabrics, did you market upholstery fabric manufactured on Cidega machines?

A Yes, we did.

Q Where did you work before you were with Tri-R?

A I was the vice-president of Cidega Machine Manufacturing in River Edge.

Q To what did you direct your energies when you worked for Cidega Machine?

1 gws

2 A Design, development and manufacturing of the
3 Cidega machine.

4 Q Have you been connected since you have been
5 with Joan with the manufacturer of Joan's Argyle knit
6 upholstery fabrics?

7 A I have.

8 Q Are you familiar with those fabrics?

9 A I am.

10 Q Mr. Gangi, I hand you a piece of fabric and
11 ask if you can identify it, please?

12 A This is our Style CK 0028 in color Celadon.

13 MR. TURNER: I ask that that be marked as
14 Defendant's Exhibit D.

15 THE COURT: Any objection, Mr. Silberman?

16 MR. SILBERMAN: No objection.

17 THE COURT: Received.

18 MR. GIBSON: May it please the Court, it might
19 shorten this thing further if we just marked these and
20 put them in without having him go through and identify
21 them also.

22 (Defendant's Exhibits D through O was marked
23 for identification.)

xx

24 MR. GIBSON: I will represent to the Court
25 that these are all defendant's Style CK 0028 in the full

1 gws Gangi - direct

2 range of colors and patterns that the defendant makes.

3 We offer them in evidence.

4 MR. SILBERMAN: I have no objection ot any of
5 thsoe exhibits, your Honor.

6 THE COURT: All right, D through O received.

7 (Defendant's Exhibit D through O for iden-
8 tification were received in evidence.)

9 MR. TURNER: We also have a full set of
10 Fleetwood fabrics here which are also fabrics which
11 correspond to the photographs that were in the exhibit
12 book which we would like to have marked with the next
13 five letters.

14 THE COURT: All right.

15 (Defendant's Exhibits P through T were
16 marked for identification.)

17 MR. GIBSON: We also represent to the Court
18 that Exhibits P through T are without the latex backing.

19 THE COURT: All right.

20 MR. SILBERMAN: I have no objection, your
21 Honor.

22 THE COURT: Received.

23 (Defendant's Exhibits P through T for
24 identification were received in evidence.)

25 MR. TURNER: We have a full line of CK 0035

1 gws

Gangi - direct

2 which we would ask to have marked as the next two
3 exhibits.

4 (Defendant's Exhibits U and V were marked
5 for identification.)

xx

6 MR. TURNER: We represent these are all of the
7 CK 0035's and they do correspond to the photographs in
8 the book that we have filed with the Court and served on
9 the other side.

10 MR. SILBERMAN: No objection.

11 THE COURT: Received, U and V.

12 (Defendant's Exhibits U and V for identifica-
13 tion were received in evidence.)

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14 MR. TURNER: Finally, your Honor, we have the
15 other color of CK 0042 in the color Gold, which I ask
16 be marked with the next defendant's exhibit letter.

17 (Defendant's Exhibit W was marked for
18 identification.)

xx

19 MR. SILBERMAN: No objection, your Honor.

20 THE COURT: Received.

21 (Defendant's Exhibit W for identification
22 was received in evidence.)

xx

23 MR. TURNER: Your Honor, this which I hold in
24 my hand now is the Electra style. It is the only one.
25 It does correspond with the photograph in the book.

gws

I would like to have it marked with the next defendant's designation.

(Defendant's Exhibit X was marked for identification.)

MR. ILBERMAN: No objection.

THE COURT: Received.

(Defendant's Exhibit X for identification was received in evidence.)

THE COURT: All right, Mr. Turner, let's go.

BY MR. TURNER:

Q What responsibilities, if any, Mr. Gangi, did you have in connection with the development of the Joan Argyle plaid fabrics which we have just introduced into the court and have spread before you on the rail before the jury box?

A I was part of the team assigned to develop this Argyle plaid.

Q When did you receive such assignment?

A I believe it was the early part of May, just after the April High Point market.

Q How did that come about?

A At a meeting.

Q Where was the meeting?

A The meeting was in Lowell.

1 gws Gangi - direct

2 Q Who else was there?

3 A Mr. Larry Ansin, Mr. Zellers, Mr. Ross and
4 myself.

5 Q Who else was a member of the team having the
6 responsibility to develop these plaid designs?

7 A Mr. Zellers and Mr. Ross.

8 Q What did you do first in going about developing
9 these fabrics?

10 A We decided what type of fabrics we wanted to
11 develop, we then decided what yarns we were going to use
12 and there was discussion of scale, limitations of the
13 machines and so forth.

14 Q Just what type of fabric did you decide you
15 wanted to develop?

16 A Well, it was decided it was going to be knitted
17 fabric.

18 Q What were your instructions with respect to
19 what you were supposed to be developing?

20 A Well, it was supposed to be an original
21 fabric.

22 Q And you decided to make it knitted; is that
23 correct?

24 A Yes.

25 Q Why was that decision made?

gws

Gangi - direct

130

1
2 A Well, Joan has the Cidega knitting machines
3 as part of its complement of machinery and I was directing
4 the operation, and we could make it a bias plaid.

5 Q So then you decided what yarns you were going
6 to use; is that correct?

7 A That's correct.

8 Q What yarns did you decide to use?

9 A We decided to use Joan's own manufactured yarns
10 that they manufactured themselves.

11 Q Why did you decide to use those yarns?

12 A These were yarns that they had used previously
13 in their fabrics. They were available to us in-house and
14 that was the decision.

15 Q All right. So you decided on the yarns.
16 Then what happened?

17 A Then I went about developing a fabric on the
18 knitting machine utilizing the yarns available to me, and
19 we arrived at several different patterns, utilizing
20 different yarns and what-have-you, and then in a period
21 of time decided that certain patterns were acceptable
22 and we would proceed with color line and general develop-
23 ment of the fabric itself.

24 Q At your initial meeting in Lowell were there
25 any fabrics before you at the time of the meeting?

1 gws Gangi - direct 131

2 A No.

3 Q Over what period of time did the development
4 of these fabrics, Joan's Argyle plaid designs, occur?

5 A Well, as I stated, we began the early part of
6 May and it must have been run until about the middle of
7 June.

8 Q Did you make more than one sample before you
9 arrived at the design that you found satisfactory?

10 A Yes, we did.

11 Q Where are these machines?

12 A The machines are located in Waldwick, New
13 Jersey.

14 Q Is that where the samples were made?

15 A Yes.

16 Q How many samples did you make?

17 A Must have made six or eight different samples.

18 Q How did you communicate what the samples looked
19 like to the other members of the committee?

20 A Well, at various times I would seek their
21 opinions. We would have meetings both in Lowell and
22 at Waldwick and discuss various aspects of the development
23 of this fabric.

24 Q At any such meeting did you ever have before
25 you any fabric other than a fabric manufactured at Joan?

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gws

Gangi - direct

A No.

Q Did you actually set the samples up on the
Cidega machines, Mr. Gangi?

A Yes, I did.

Q Was that true of all of them?

A Yes.

Q About what time of the year was it that you
finally decided you had the design you wanted?

A Well, it must have been about the early part
of June.

Q Have you ever seen plaintiff's Novelty No. 253
fabric prior to today?

A Yes.

Q When was the first time you saw such fabric?

A I believe I saw it at the April market.
I may have seen it earlier.

Q That is the April market in High Point?

A That's correct. I'm sorry.

Q At any point while you were developing the
samples which eventually became Style CK 0028 and so forth,
did you ever have any Novelty 253 fabric?

A In my possession?

Q Yes, sir.

A No.

1 gws Gangi - direct

2 Q Did you have any at Waldwick at the Waldwick
3 plant?

4 A No.

5 Q Do you know whether or not anyone in Joan had
6 any?

7 A I can't say. No, I don't believe so.
8 They may have, but not to my knowledge.

9 Q When was the first time you saw any Novelty
10 253 fabric at Joan?

11 A At Joan was in the June meeting.

12 Q What June meeting was that?

13 A The June meeting where we displayed the
14 fabrics and spoke with Mr. Ansin and the attorney.

15 Q All right, sir.

16 Now you are familiar with Plaintiff's 253
17 fabric; are you not?

18 A Yes, I am.

19 Q You are familiar with Joan's fabrics; is that
20 correct?

21 A Yes.

22 Q Based on your familiarity, can you tell us
23 what in your mind are the differences between the two
24 fabrics?

25 A The one difference that is very apparent is

1 gws Gangi - direct

2 the types of yarn used on the surface to cause the
3 patterning. The next apparent different is the
4 dimensional size of ours and, in relation to his, ours
5 is more flattened down and his is a more perfect square.
6 The next apparent difference to me is the dimension of
7 the major diamond. It's much thicker and spread out
8 and striped.

9 The next apparent one is that if you look
10 on a diagonal on our fabrics, the major diamond and the
11 minor diamond looks like one continuous yarn, whereas
12 253 and 256, the line is not a continuous straight line,
13 it is offset at various points due to the construction
14 of the fabric.

15 Q Mr. Gangi, I hand You some fabric which has
16 been already marked as Exhibit 2 in this proceeding
17 here this afternoon and ask you if you recognize that?

18 A Yes, I do.

19 Q All right, sir. Let me hand you a fabric
20 which has been marked as Defendant's Exhibit D and is a
21 sample of CK 0028 manufactured by Joan.

22 You have just testified about the major
23 diamond being broader and more striped. Will you point
24 out the portion of the Joan fabric you are talking about
25 when you said that?

1 gws Gangi - direct

136

2 but rather a jagged line.

3 Q Do you see any other apparent differences?

4 A Yes, the size and type of yarn that he uses
5 is much different than ours.

6 Q When you say that, are you speaking of the
7 ground yarn?

8 A I'm speaking of all of the yarns.

9 Q Would you first explain the difference as far
10 as the ground yarn is concerned?

11 A All right. On the ground yarn he is
12 definitely using a slub yarn, which is a fat and skinny
13 yarn, to be more descriptive.

14 Our yarn is of a uniform nature and does
15 not give the lean appearance at certain points that his
16 yarn does, whereas you can see the backshot, as it was
17 referred to.

18 Q All right, sir.

19 How about the pattern yarn?

20 A The pattern yarn is much different. Ours is
21 a much smoother yarn, a much flatter yarn and does not
22 give the crossover appearance, the bulk of the crossover
23 appearance, as his does.

24 Q Are there any other differences which you see
25 at this time, sir?

1 gws Gangi - direct 137

2 A The size, the colorations, the fact that it's
3 spaced out. They are all different.

4 Q Have you had occasion, Mr. Gangi, to examine
5 the knitting structure of btoh Novelty No. 253 and the
6 Joan fabric CK 0028?

7 A Yes.

8 Q Based on your examination, Mr. Gangi, what can
9 you say with respect to whether or not the knitting
10 structure is stitch for stitch the same?

11 A It is not stitch for stitch. He has addi-
12 tional movements in his design bar, we do not. The
13 compactness of our background is much different than his.
14 Our ground gives a more solid appearance.

15 Q Is that connected with the knit construction,
16 Mr. Gangi?

17 A Yes, it is.

18 Q In what way?

19 A In the amount of take-down of your knitted
20 fabric, you can control the density of your ground.

21 Q Is there any difference in the number of
22 stitches in which you found when comparing the two
23 fabrics?

24 A Yes, there is a difference. There is a
25 difference. Ours -- when I say "ours," Joan's has 74

1 gws Gangi - direct

2 or 76 stitches to the repeat and Novelty has 81.

3 Q What role did Mr. Zellers play in the develop-
4 ment of these Joan Argyle plaid designs?

5 A Mr. Zellers was very instrumental in the concept,
6 what we were trying to achieve. We worked together in
7 the color selections from the yarns available from Joan.
8 The construction as to the quality was discussed with
9 Mr. Zellers. That's one of our prime considerations,
10 the quality of the fabric, the appearance, the salability
11 of it because of that.

12 Q What role did Mr. Ross play in the develop-
13 ment of these Argyle plaid designs?

14 A Mr. Ross was also very instrumental in the
15 selection of the colors from Joan's available yarns.
16 Again, we worked as a team effort, so we discussed quality,
17 and all these problems were talked about amongst us.

18 Q Would you tell the Court, Mr. Gangi, what is
19 the principal difference between Style CK 0042 and Style
20 CK 0028?

21 A Yes. The yarns that are used in the overlay,
22 in the design, the size of the yarns used.

23 Q Which of the two styles has the greater size
24 yarns?

25 A 28 has a greater size yarn in the large diamond

1 gws Gangi - direct

2 than 42 does.

3 Q What is the difference between Style 28 and
4 Fleetwood?

5 A Again, the type of yarn, size of yarn used.

6 Q I hand you the piece of fabric which has been
7 marked as Defendant's Exhibit P and which has been identi-
8 fied to the Court as an example of Fleetwood.

9 You have before you from previously that you
10 have been testifying about an example of Style 28.

11 Would you observe the style Fleetwood and the
12 style 28 and explain what you see is the difference
13 between them?

14 A Yes. On Style 28 in the major diamond the
15 yarns are all the same type and color.

16 On style Fleetwood the yarns are different
17 within that large diamond, and I'll explain that.

18 The center has a different color and different
19 type yarn than the two outside spaced-out yarns comprising
20 the large diamond.

21 Q Is it correct that the broad striated stripe
22 has a center of a different color than the outer
23 portions?

24 A Yes.

25 Q Mr. Gangi, have you been connected with the

gws

Gangi - direct

1
2 marketing of these Argyle plaid fabrics in behalf of
3 Joan?

4 A Somewhat, yes.

5 Q Have you had occasion to go to furniture shows
6 in connection with the marketing of fabrics?

7 A Yes, I have.

8 Q Have you had occasion to speak with customers
9 of Joan in connection with the marketing of these
10 fabrics?

11 A To some degree, yes.

12 Q To your knowledge, have these fabrics ever
13 been sold as substitutes for or imitations of Novelty
14 Style No. 253?

15 A No, they could not.

16 Q Are you aware of any reactions of your
17 customers as to any difference or similarity as between
18 No. 253 and Joan's Style 28 or the lack?

19 MR. SILBERMAN: Objection, your Honor. That's
20 hearsay.

21 MR. TURNER: He can state what they have said
22 to him. He can't know what their feeling is, your
23 Honor.

24 THE COURT: I will listen to it.

25 Overruled.

gws

Gangi - direct

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A May I ask you to restate that? I'm sorry.

Q Are you aware of any reactions of Joan's customers as to any differences or any similarities as between Novelty No. 253 and any of the Joan Argyles, including 28 or the like?

A It was never referred to as being similar. When we talk about our fabric, this was our fabric. They either liked it or didn't like it on the basis that it was ours. It was our design.

There was never the comparison or attempt to make a comparison and say this is exactly like his. That is not so. That couldn't be.

Q Are you continuing to participate in the development of Argyle fabrics on behalf of Joan?

A Yes, I am.

Q Is Joan continuing to come up with new and additional designs of Argyle fabrics?

A Yes.

Q All of these fabrics are made on Cidega machines; is that correct?

A Yes.

Q Mr. Gangi, I hand you a djess which has been previously been marked as Defendant's Exhibit A.

What can you tell us about that dress?

gws

Gangi - direct

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1 A This dress was purchased from a company
2
3 called Alphabet Unlimited some six or seven years ago,
4 of which Mr. Feinberg was part of the company, an owner
5 of the company to some degree. I phoned Mr. Feinberg
6 and set up an appointment with the people to purchase
7 various garments from them, which I did, and received
8 this and other fabrics -- other garments, excuse me.

9 Q In what connection would you want to purchase
10 a dress?

11 A I had a ladies knitwear factory outlet type
12 of an operation.

13 Q During what period of time did you have --

14 THE COURT: I don't know what that has got to
15 do with the case before me, Mr. Turner. I am really
16 shocked that Mr. Silberman is not objecting. It has
17 nothing to do with my issue here.

18 MR. TURNER: If your Honor please, the range
19 of styles of Argyle plaids that have gone before will
20 affect the scope of protection.

21 THE COURT: I have no doubt that the range of
22 Argyle plaids is limitless.

23 MR. TURNER: We believe it is, too, your
24 Honor.

25 THE COURT: That is not the issue I have here.

1 gws

Gangi - direct

2 MR. TURNER: It does effect two issues, your

3 Honor.

4 THE COURT: I am not going to let this go on.

5 I am telling you right now. I am limiting your examination.

6 Stop it right now.

7 MR. TURNER: Yes, sir.

8 THE COURT: I am not saying you can't ask him
9 about other things. As far as this is concerned, out.

10 MR. TURNER: I understand. Let me check my
11 notes and see what else I have.

12 One moment, your Honor, while I consult with
13 co-counsel.

14 (Pause.)

15 MR. GIBSON: May it please the Court, what we
16 want to do is to identify the samples of the bias plaid
17 fabrics which were within the design department of defendant
18 during this period and other bias plaid fabrics that are
19 in the public domain at this time. That can best be
20 done with Mr. Ross, which would I think speed up the
21 matter.

22 THE COURT: I have no doubt whatsoever that
23 Joan has an adequate library plus innumerable samples of
24 Argyle plaids and bias plaids. I think Mr. Silberman
25 will probably agree with you as far as that is concerned.

1 gws

Gangi - direct

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2 MR. GIBSON: If your Honor please, some of
3 them are so similar to the plaintiff's designs as far as
4 the design features are concerned, we contend they raise
5 serious questions as to whether or not there is any
6 artistic expression present in this design that is subject
7 to protection. Certainly it would narrow the scope so
8 that the design elements about which everybody seems to
9 agree would have a significant bearing on whether or not
10 the plaintiff's copyright is of such breadth in scope as
11 to prevent us from marketing this on preliminary injunction
12 petition. Therefore we respectfully ask leave to at
13 least mark them and get them in.

14 THE COURT: Show them to Mr. Silberman.

15 MR. SILBERMAN: Your Honor, Mr. Gangi has
16 testified that he made up his design with nothing in front
17 of him. It will be my position that I will object to
18 the introduction of any design which he does not claim
19 his design was actually based on during the period of
20 time which he made his design.

21 I agree that there are plaids and bias plaids
22 that are older than Methuselah, I guess is the expression.
23 I don't feel they have any relevance to this case.

24 If they can show that the plaintiff's copy-
25 righted design was copied from something else so as to

1 gws Gangi - direct 145
2 invalidate the copyright, then they are entitled to
3 introduce that evidence. But to have them introduce
4 dozens and hundreds of prior art designs that may bear
5 some relationship because they have zigzags or square in
6 them, it is my position they are irrelevant and I will
7 object to the introduction of any of those designs.

8 THE COURT: Did he have any of these before him
9 when he was working?

10 MR. GIBSON: They had knowledge of them.

11 THE COURT: Did he have knowledge of them?

12 MR. GIBSON: I will ask him.

13 THE COURT: Ask him.

14 BY MR. GIBSON:

15 Q Mr. Gangi, did you have knowledge of any bias
16 plaid designs that were within the design department of
17 Joan Fabrics while you were working on the designs of
18 these fabrics?

19 A I had knowledge of them, of course.

20 THE COURT: Did you consult them? Did you
21 look at them?

22 THE WITNESS: Your Honor, they are all around
23 in the design studio. They are there all the time,
24 sir.

25 Q Did you specifically pull any of the fabrics

gws

Gangi - direct

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1 out and lay them on the table and say we are going to
2 use this feature from this design when we put it over in
3 this fabric?
4

5 A No, not specifically one, no.

6 Q Did you do that with Novelty's fabric 253?

7 A Did I put his out there?

8 Q Yes, and say we are going to copy this?

9 A No, I did not.

10 Q Did you, in fact, engage in any copying of
11 Novelty's fabric 253?

12 A I did not have Novelty's.

13 MR. GIBSON: Your Honor, we would still offer
14 them based on the fact that they were there and that
15 the designers had knowledge of them. I have Mr. Ross
16 here who had --

17 THE COURT: We have his statement on the record
18 that they were there. They are all over the place and
19 he looked at them. He didn't have them in front of him
20 while he made up the design on the machine. I think
21 that's enough. I don't want to clutter the record.

22 MR. GIBSON: All right, your Honor.

23 We have no further questions.

24 MR. TURNER: No further questions for Mr. Gangi.

25 THE COURT: All right.

gws

Gangi - cross

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CROSS EXAMINATION

BY MR. SILBERMAN:

Q Mr. Gangi, where is the design studio where all these samples are retained?

A One of them is located in Lowell and I have a design studio in Waldwick.

Q When did you first commence employment with Joan?

A I believe it began in January of last year.

Q How did that happen to take place?

A How did that happen?

Q How did you happen to become employed by Joan?

A Joan purchased Tri-R Industries, which was my brother and myself. We owned that company.

Q I believe in your affidavit you stated that Joan also purchased Cidega; is that correct?

A They purchased Cidega machine from my father.

Q Did you own any stock in Cidega?

A No.

Q Were you an employee of Cidega at the time they made the purchase?

A No.

Q When was that purchase made?

A The same time.

gws

Gangi - cross

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Q When was that?

A I'm sorry, it was in January. I can't give you the exact date. I could get it for you. If you needed the exact date, I could get it for you. If you needed the exact date, I could get it for you.

Q January '76?

A I believe so. I would have to go to the records and give you the exact date on that.

Q Could it have been May 1976?

A It may have been. The finalization was May, yes.

Q In your affidavit which was executed --

MR. GIBSON: Yesterday -- this morning, excuse me.

Q In your affidavit which was executed this morning you state that:

"Cidega was also acquired by Joan in February 1976."

What did you base that statement on?

A As I explained to you, I thought it was the January -- the end of January, beginning of February time period.

Q Did you check any records in making that affidavit?

gws

Gangi - cross

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2 A No, I brought it -- I brought it to my mind
3 that that was the time period.

4 Q When did you commence your work at Cidega,
5 employment at Cidega?

6 A When?

7 Q Yes.

8 A Some four and a half years previous to that.

9 Q Did you testify that you designed the Cidega
10 machines?

11 A No, I did not testify that I designed the
12 Cidega machines. I was involved in the design and
13 development of the Cidega machines, not the designer of
14 the Cidega machines. Cidega has a policy, as most
15 machine manufacturers do, of ongoing development and
16 improvement.

17 Q Isn't it a fact that the Cidega knitting
18 machine were in existence before you were born?

19 A Oh, yes, it is. I never made reference to
20 being the designer of the Cidega machine.

21 Q I just thought your testimony was a little
22 confusing.

23 A I'm sorry.

24 THE COURT: I don't see what any of this has
25 to do with the problem I have.

gws

Gangi - cross

150

THE WITNESS: I don't understand either.

Q In your affidavit, Mr. Gangi, you state that you believe you set the first bias plaid design around the middle of 1976, that you were able to do it without anything in front of you and that this first sample, like six or more thereafter, were rejected as not having a unique enough appearance.

Is that a correct statement?

A I believe so.

Q Who rejected those samples?

A When we were as a team, we sat down and there were various aspects we did not like of various patterns.

Q What do you mean they were not unique enough?

A Well, we didn't think they were a marketable fabric. It did not have the appeal we were trying to achieve.

Q You testified that once a decision had been made to produce a line of Argyle plaids, they you were the one who decided to use the Cidega knit machines; is that correct?

A No, I did not say that.

Q Who did make that decision?

A We did.

Q Who is "we"?

gws

Gangi - cross

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A The team and the management at Joan.

3

Q Were you involved in that decision?

4

A I had input into the decision.

5

Q Were you there the day that decision was made?

6

A I believe I was.

7

Q Does Joan have weaving machines?

8

A They do.

9

Q Why didn't you recommend making them on

10

weaving machines?

11

A Because to make it on a weaving machine, a

12

bias plaid, you would have to use a Jacquard machine,

13

knitting machine. We had knitting machines available

14

that can do this and have done this for many years.

15

Q Were you aware at that time that Novelty's

16

fabrics was knitted?

17

A I believe I stated I was.

18

Q I don't think that question was previously

19

asked, but I will accept your answer.

20

Mr. Gangi, we have in front of us Defendant's

21

Exhibit D, which is a sample of CK 0028.

22

A Right.

23

Q I am pointing to a particular ground yarn, and

24

I ask you if you can tell me whether the length of that

25

piece of yarn between the two cross bars is of uniform

1 gws Gangi - cross 152
2 width?
3 A Is it of uniform width?
4 Q Yes.
5 A It varies a slight bit.
6 Q But that is not a slub yarn?
7 A No, not in relation to the eovelty slub yarn.
8 This is not considered a slub yarn.
9 Q But it is non-uniform in the Joan fabric?
10 A All yarns are not that uniform.
11 Q I believe you testified that the Joan fabric
12 was made up of uniform yarns to give a uniform appearance.
13 A Yes.
14 Q I ask you again:
15 Is that a uniform yarn?
16 A It is -- let me put it this way:
17 It is a uniform yarn, but does vary a slight
18 bit.
19 Q I believe on direct examination, Mr. Gangi,
20 you testified that no discussion ever came up with any
21 customer of Joan fabric as to whether the Joan fabric was
22 different from the Novelty fabric; is that correct?
23 A That's correct. We sold this and we dis-
24 cussed this with our customers. Our Argyle plaid, it
25 does not have the same characteristics that I pointed out

1 gws

Gangi - cross

2 before of the Novelty fabric.

3 Q Did you provide the information for the
4 affidavit that you signed this morning?

5 A If you are asking me if that's my affidavit --

6 Q I am asking you if you provided the information
7 for the affidavit that you signed this morning in this
8 case.

9 A If it's got my name on it, I did.

10 Q In Paragraph 13 you say:

11 "Indeed, I have heard of more than one such
12 customer who refused to buy our fabric because it
13 was so different from No. 253."

14 I ask you the names of the customers who
15 refused to buy the Joan fabric because it was so different?

16 A Well, that I can't give you name for name
17 because of the time that this was coming about, I was
18 just being introduced to these people and I was not
19 totally involved in the entire discussion and these were
20 parts of the discussion that I was privy to.

21 Q You go to say in Paragraph 13 that:

22 "Others have liked it because it does present
23 such a different appearance."

24 I ask you who are those others that liked it
25 because it presents such a different appearance?

1 gws

Gangi - cross

2 A Again, I have to tell you I haven't got name
3 for name. I know people liked it because it was a
4 different piece of fabric. It was a different
5 appearance.

6 Q Mr. Gangi, I would like to know:

7 Of the various styles that have been introduced
8 in evidence as being Jones' fabrics, which came in order
9 of time?

10 A Of the fabrics introduced?

11 Q Yes. That's CK 0028, Fleetwood, CK 0035,
12 CK 0042 and Electra.

13 A Okay. CK 0028 represents Cidega knit
14 number 28th style. That was the 28th style we had
15 produced.

16 The next one is CK 0035, which means it was
17 the 35th fabric produced.

18 42 again represents the 42nd fabric that we
19 made.

20 At that time we decided to change from the
21 numbering system, which seemed to have given some confusion,
22 to a name of a fabric, and we went to Fleetwood.

23 Now, Electra is one of our newest efforts, and
24 that is the gray pattern on the rail.

25 Q Can you tell us of CK 0028 what was the color

1 gws Gangi - cross 155
2 combination of the first acceptable sample that you laid
3 up? Was it Sand?

4 A No, it was not what you are referring to.
5 It was not sand. It was some other coloration, an we
6 developed a whole color line as you have seen on the
7 exhibits here.

8 Q When the design group decided on CK 0028, how
9 many colors had already been designed when that decision
10 was made?

11 A Let me understand your question.

12 Q When they approved CK 0028.

13 A We first approved a design and then we first
14 sit down with the yarns available for Joan and structure
15 a color line.

16 Q What was the color combination of that design?

17 A The first one I don't recall. It may have
18 been a Rust and it may have been a Burgundy. There was
19 no specific one color design to attempt that Argyle plaid.
20 I think that's what you are referring to.

21 Q You don't recall what it was?

22 A No. There was no color intention. It was
23 pattern intention.

24 Q What would you say is the largest size diamond
25 you could make on a Cidega machine?

1 gws Gangi - cross 156

2 A The largest size diamond? I would like you
3 to clarify that.

4 Are you asking for the machine movement, are
5 you asking for color appearance? What do you want from
6 me?

7 Q Let's look at Exhibit D, CK 0028.

8 A Right.

9 Q Taking from the middle of the intersection of
10 the broad stripe to the middle of the intersection of
11 the next stripe, how large can that dimension be? What
12 is the maximum that that dimension can be?

13 A You are asking what is the maximum machine
14 movement?

15 Q Yes.

16 A I don't like confusion. We have at the
17 present time about a four-inch capacity. We can exceed
18 that if we needed it.

19 Q Have you ever gone to five?

20 A No, not at this time.

21 Q But the machine has the capability of going
22 beyond that?

23 A My machine does, yes.

24 Q In your affidavit in Paragraph 15 you say
25 that the maximum size you could get on a Cidega machine

1 gws Gangi - cross
2 is this diamond size; is that correct?

3 A Yes. At the time we did this, that was
4 the biggest we could get, a four-inch half movement.

5 Q Your machine has subsequently been modified
6 so you can go larger?

7 A Right.

8 MR. SILBERMAN: I have no further questions of
9 Mr. Gangi.

10 THE COURT: All right.

11 MR. GIBSON: I have just a couple.

12 REDIRECT EXAMINATION

13 BY MR. GIBSON:

XX 14 Q Mr. Gangi, this development that you spoke
15 about of making the diamond go larger, is that a production
16 viable alternative at this time or is it just in the
17 development stages?

18 A It's in the developmental stages right now.

19 Q After you decided on the type of design for
20 CK 0028 and were using the yarns to arrive at the various
21 color patterns and so forth --

22 A Correct.

23 Q Did you use any yarns that were not already
24 being made by Joan Fabrics at that time?

25 A No, we used the yarns that they were using in

Gangi - redirect

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their weaving operation that was available to us.

Q Is it also true that when they used those yarns in their weaving operation, they also used them in the same combinations in other fabrics?

A Of course.

MR. GIBSON: No further questions.

THE COURT: Anything further, Mr. Silberman?

MR. SILBERMAN: I am just thinking about the last question, your Honor.

THE COURT: That's nice.

I am going to excuse the witness.

MR. SILBERMAN: Fine. Thank you, your Honor.

(Witness excused.)

THE COURT: Mr. Gibson.

MR. GIBSON: With the limitations the Court has imposed on us, we will rest at this time.

THE COURT: I don't want you to feel that you have been deprived now. You said you might have one short witness.

MR. GIBSON: The short one was to put in the samples.

THE COURT: I will still restrict you as far as that is concerned.

MR. GIBSON: All right, sir.

gws

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1 THE COURT: You rest at this time?

2 MR. GIBSON: Yes, your Honor.

3 THE COURT: I assume you will have no one in
4 rebuttal or anything else.

5 MR. SILBERMAN: No, your Honor. I have nothing
6 further.

7 THE COURT: All right. I will reserve.

8 MR. SILBERMAN: Your Honor, since we have just
9 been served with their answering brief, may we have a short
10 period of time to put in a reply brief?

11 THE COURT: Answering brief? I didn't see
12 any answering brief. I have seen a brief.

13 MR. SILBERMAN: Their brief, which I just
14 received Tuesday night.

15 THE COURT: Sure.

16 MR. SILBERMAN: I will put it in within less
17 than a week.

18 THE COURT: Fine.

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WITNESS INDEX

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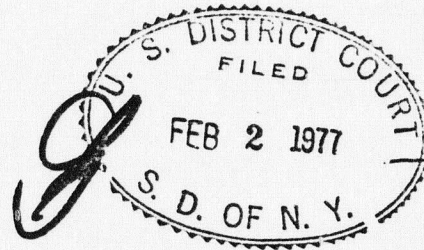
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MEMORANDUM DECISION - HON. HENRY F. WERKER,
U.S.D.J., DATED JANUARY 31, 1977

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----x
NOVELTY TEXTILE MILLS, INC., :
Plaintiff, :
- against - :
JOAN FABRICS CORPORATION, :
Defendant. :
-----x



MEMORANDUM DECISION

76 Civ. 5753 (HFW)

APPEARANCES: (See last page)

HENRY F. WERKER, D. J.

The parties to this action are both manufacturers of upholstery fabrics. Plaintiff Novelty Textile Mills, Inc. ("Novelty") contends that defendant Joan Fabrics Corporation ("Joan") has infringed upon its design for a "bias" or "argyle" plaid upholstery fabric, which is copyrighted as "Style 253." In this action, Novelty seeks injunctive relief, impoundment and destruction of the allegedly infringing copies and damages and has moved for a preliminary injunction, pursuant to Rule 65 of the Federal Rules of Civil Procedure, enjoining defendant "from manufacturing, producing, publishing, distributing, advertising or selling, offering for sale or otherwise disposing of upholstery fabrics . . . similar to plaintiff's copyrighted Style 253." The court held an evidentiary hearing on January 20, 1977 to consider Novelty's entitlement to preliminary equitable relief and has now concluded that the motion must be denied.¹ The court's findings of fact and conclusions of law, required by Rule 52(a) of the Federal Rules of Civil Procedure, are hereinafter set forth.

Novelty created Style 253 during the latter part of 1975 and first

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displayed it to the trade in January of 1976.² The fabric, manufactured on "Cidega" warp knitting machines, sold well and was delivered to furniture manufacturers in commercial quantities beginning in March of 1976. Several manufacturers exhibited display models of their furniture, upholstered with Style 253 fabric, at a regional furniture trade market held in April, 1976 at High Point, North Carolina.³ There, Joan's sales and design personnel saw Style 253 and learned that there was a substantial demand for bias plaids among its customers.

Joan's management thereafter determined, in May of 1976, that it too should offer a collection of bias plaid upholstery fabrics. The committee charged with the design of new fabrics was told that it was to avoid any infringement of fabrics manufactured by others.⁴ After rejecting several of the committee's proposed designs, Joan published four bias plaid fabric designs, denominated "CK0028," "CK0035," "CK0042" and "Fleetwood," under copyright notices during the summer of 1976. Subsequently, Joan developed a fifth bias plaid design known as "Electra" and discontinued manufacture of CK0035 due to lack of customer response.

Arthur Feinberg, the president of Novelty, first saw Joan's new designs at the High Point Market held during the third week of October, 1976. Sales of Style 253 declined precipitously following Joan's introduction of its new lines. By comparing the volume of sales of Style 253 prior to October, 1976 with that achieved thereafter and adjusting those figures to reflect variations in Novelty's total revenues during each of these periods, Feinberg concluded that Novelty's continuing losses amounted to approximately \$11,000 per week; he attributed all of this sum to the activities of Joan.⁵

In order to prevail on its motion for a preliminary injunction, Novelty must make a "prima facie showing that [its] copyright is valid, that the opposing

MEMORANDUM DECISION - HON. HENRY F. WERKER,
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party has infringed and that the balance of hardships tips decisively in /its/ favor." Deering-Millikin, Inc. v. Quaker Fabric Corp., 187 U.S.O.Q. 288, 289 (S.D.N.Y. 1975), citing Rushton v. Vitale, 218 F.2d 434, 436 (2d Cir. 1955). Indeed, Novelty must show that there is some likelihood of irreparable injury, see American Visual Corp. v. Holland, 219 F.2d 223, 224 (2d Cir. 1955), and that monetary damages will not make it whole, American Fabrics Co. v. Lace Art, Inc., 291 F. Supp. 589, 590 (S.D.N.Y. 1968).

For the purposes of this motion, and in the absence of any evidence to the contrary, the court must assume since Novelty has shown that it holds a certificate of copyright registration that Novelty's copyright in Style 253 is valid. Harcourt Brace & World, Inc. v. Graphic Controls Corp., 329 F. Supp. 517, 525 (S.D.N.Y. 1971). I turn, therefore, to a consideration of the Novelty and Joan designs.

In general, bias plaids are composed of two sets of intersecting diamonds (or boxes), each of which is formed, in knit fabrics, by the proper alignment of two "zig-zag" stripes upon a relatively neutral background material. Depending upon the mix and intensity of the colors employed and the spatial relationships among the stripes and the background, one of the diamond patterns will appear to be predominant.

Style 253 is available in several alternative color combinations known in the industry as "color-ways." Of these, "Cane" proved to be the most successful, accounting for approximately 75 percent of Style 253's sales to date. Each of the Joan fabrics considered to be an infringement of Style 253 is manufactured in at least one color-way comparable to Cane.⁶ Since these color-ways emphasize the features that are common to Style 253 and its alleged copies, the court bases the following discussion and its conclusion that there has been no improper

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appropriation of Novelty's design upon a comparison of this representative sample of the myriad color combinations available from Novelty and Joan alike.

Clearly, there are similarities among the fabrics. Each uses brown, camel or beige, and beige or off-white yarns on a light-colored background to form a plaid design consisting of intersecting diamonds with an interior dimension of approximately four inches. (At the time the fabrics were designed, this was the maximum possible span on the type of knitting equipment employed by the parties.) Also, in each fabric, one series of diamonds is formed by a stripe which is somewhat broader than the other.⁷ Nevertheless, the differences between Style 253 and the Joan fabrics far exceed the similarities.

First, it is readily apparent that the broader stipes in the Joan fabrics are nearly twice the width of their counterparts in Style 253. They are also composed of several distinct yarns separated by either background material or other colored yarns. In contrast, the broader stipes in Style 253 give the appearance of greater uniformity through the use of yarns placed much more closely together.

Second, from apex to apex, the diamonds in the Joan fabrics seem longer in one dimension and shorter in the other than the comparable spans in Style 253. This results in a more regular, box-like design in Style 253.

Third, where the zig-zag stripes in style 253 intersect to form an angle of a diamond, they appear to be intertwined, with one stripe passing over the other. This effect is not apparent in any of the Joan fabrics presented to the court.

Fourth, the stipes in Style 253 seem to, and actually do, have greater depth than those which are found in Joan's fabrics.

Finally, Novelty's background material is formed by an ordered progression of "slub" yarns (which vary considerably and unpredictably in breadth

MEMORANDUM DECISION - HON. HENRY F. WERKER,
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along their length) while Joan's fabrics all have a more uniform background design.

Novelty correctly observes that an alleged copy need not mirror a copyrighted design in every respect, and that substantial similarity among fabrics is enough to establish infringement. Comptoir de L'Industrie Textile de France v. Tilbury Fabrics, Inc., 189 U.S.P.Q. 442, 443 (S.D.N.Y. 1975). To determine whether this standard has been met, the courts have frequently made reference to what is now known as the "ordinary observer" test, which is

" 'whether an average lay observer would recognize the alleged copy as having been appropriated from the copyrighted work.' Ideal Toy Corp. v. Fab-Lu Ltd., 360 F.2d 1021, 1022 (2d Cir. 1966)." United Merchants and Manufacturers, Inc. v. K. Gimbel Accessories, Inc., 294 F. Supp. 151, 154 (S.D.N.Y. 1968).

The ordinary observer should not be equated with the casual observer, however, for general public opinion provides only limited evidence of unauthorized appropriation. 2 Nimmer on Copyright § 143.52 (1976). As Judge Learned Hand noted "one should consider the uses for which the design is intended, especially the scrutiny that observers will give to it as used." Peter Pan Fabrics, Inc. v. Martin Weiner Corp., 274 F.2d 487, 489 (2d Cir. 1960) (emphasis added).

Since Novelty sells most of its upholstery fabrics to furniture manufacturers, the degree of similarity between Style 253 and the alleged Joan copies should be evaluated from the perspective of such individuals or firms.

While each of these disparities considered separately constitutes but a slight modification of Novelty's copyrighted design, the field of bias plaids appears to be a "well-ploughed" one,⁸ and striking distinctiveness is, therefore, not necessary in order to establish lack of infringement. Any variation beyond the trivial may properly be considered an independent creation. United Merchants and Manufacturers, supra at 152. The court finds that each of the differences noted

MEMORANDUM DECISION - HON. HENRY F. WERKER,
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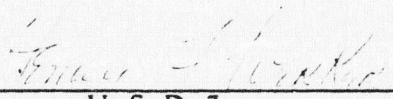
would be apparent to a furniture manufacturer, or for that matter to a consumer seriously contemplating purchase of a couch covered with one or another of the fabrics, and consequently concludes that substantial similarity and therefore copyright infringement has not been shown.

The court is also of the opinion that Novelty has failed to show that money damages would not be adequate compensation for any damages incurred should it ultimately prevail on the merits. Indeed, Novelty has already introduced an approximate estimate of its weekly losses arising from Joan's alleged violations of the Copyright Act. Moreover, although Novelty intimates that its reputation will be injured in the event that Joan is permitted to continue marketing its allegedly infringing designs, there is no evidence that there has been any confusion among Novelty or Joan's customers resulting from the availability of the Joan designs. Consequently, it cannot be said that Novelty will sustain any irreparable injury if interlocutory relief is denied.

The motion is therefore denied.

SO ORDERED.

DATED: New York, New York
January 31, 1977



U. S. D. J.

MEMORANDUM DECISION - HON. HENRY F. WERKER,
U.S.D.J., DATED JANUARY 31, 1977

NOVELTY TEXTILE MILLS, INC. v. JOAN FABRICS CORPORATION

76 Civ. 5733 (HFW)

NOTES

1. At the hearing, Novelty also contended that its "Style 256" had been copied by Joan. Style 256 uses a different type of yarn in its background material which, in turn, yields a somewhat different color in the finished product. Since Styles 253 and 256 are alike in all other respects, the court's decision on the instant motion extends to Style 256 as well.
2. New upholstery fabric designs are generally unveiled in January of each year. Thereafter, "square and color lines," consisting of a large fabric swatch in the most attractive color combination and smaller samples showing alternative color possibilities, are sent to furniture manufacturers to assist them in placing their orders.
3. Regional furniture markets are held in several different cities in January, April and October of each year. The High Point Market is one of the more important trade events.
4. Ansin testified that Joan has had an express policy of noninfringement since 1972, when it unknowingly infringed a copyright by copying a fabric design at the request of a customer. With the exception of that instance and the present action, Ansin stated that no competitor has brought suit against Joan for copyright infringement.

At Ansin's request, Joan procured a sample of Style 253 and asked its counsel for an opinion as to the originality of Joan's designs. Ansin said that he took this unusual measure because Novelty's president was both a valued customer of a Joan subsidiary that manufactured knitting machines and, through another corporation in which he had an interest, a major supplier of the yarns used by Joan.

5. The accuracy of this estimate is, at best, questionable since it attributes all of Novelty's losses to the activities of Joan and reflects Novelty's sales in areas other than commercial upholstery.
6. It is unclear if Novelty considers Electra to be an infringement of Style 253, since it is available only in a greatly different color combination. In any event, the court considers the differences between Electra and Style 253 to be even more marked.
7. Although it is not apparent to the untrained eye, both Novelty and Joan have also used the "design bar" and the "ground bar" of their knitting machinery to "lay in" their patterns, a distinctive method of manufacture not necessitated by the limitations of the equipment employed.
8. Arthur Feinberg conceded on cross examination that a bias plaid manufactured

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by a third party using similar colors but smaller diamonds was not an appropriation of his copyrighted design. From this, it is apparent that the only a very limited degree of innovation is necessary to avoid a finding of infringement here.

MEMORANDUM DECISION - HON. HENRY F. WERKER,
U.S.D.J., DATED JANUARY 31, 1977

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Joel T. Turner
Of Counsel

NOTICE OF APPEAL

UNITED STATES DISTRICT COURT *1500 Bell.*
SOUTHERN DISTRICT OF NEW YORK

-----X

NOVELTY TEXTILE MILLS INC., : CIVIL ACTION NO.

Plaintiff - Appellant : 76 Civ. 5753

v. : Judge Werker

JOAN FABRICS CORPORATION :

Defendant - Appellee :

-----X

NOTICE OF APPEAL

Notice is hereby given that NOVELTY TEXTILE MILLS INC., plaintiff above named, hereby appeals to the United States Court of Appeals for the Second Circuit from the order of Judge Werker dated January 31, 1977 and filed February 2, 1977 denying plaintiff's motion for a preliminary injunction enjoining defendant, pending the trial of this action, from manufacturing, producing, publishing, distributing, advertising or selling, offering for sale or otherwise disposing of upholstery fabrics or other goods which infringe plaintiff's registered copyright.

New York, New York

February 10, 1977

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*FILED
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SOUTHERN DISTRICT OF NEW YORK*

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

FRANTZ FONTAINE, being duly sworn,
deposes and says that deponent is not a party to the action,
is over 18 years of age and resides at 193 Kane St.
Brooklyn, N. Y.

That on the 28th day of FEBRUARY, 1977,
deponent personally served the within JOINT APPENDIX

upon the attorneys designated below who represent the
indicated parties in this action and at the addresses below
stated which are those that have been designated by said
attorneys for that purpose.

By leaving 3 true copies of same with a duly
authorized person at their designated office.

~~By depositing true copies of same enclosed
in a postpaid properly addressed wrapper, in the post office
or official depository under the exclusive care and custody
of the United States post office department within the State
of New York.~~

Names of attorneys served, together with the names
of the clients represented and the attorneys' designated
addresses.

KAYE, SCHOLER, FIERMAN, HAYS & HANDLER
Attorneys for Defendant-Appellee
425 Park Ave.
New York, N. Y. 10022

Sworn to before me this

28th day of FEBRUARY, 1977.

Frantz Fontaine

Michael DeSantis

MICHAEL DeSANTIS
Notary Public, State of New York
No. 03-0930908
Qualified in Bronx County
Commission Expires March 30, 1978

Counsel Press, 55 West 42nd Street, PE 6-8460
(6120)